SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 415

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

In Equity. No. 831

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants

PETITION

To the Honorable Judge of the United States District Court, for the Western District of Michigan, Northern Division:

Plaintiff, Escanaba and Lake Superior Railroad Company, a corporation, brings this suit in equity against the United States of America and the Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside and annulling a certain order, more particularly hereinafter described, issued by the Interstate Commerce Commission on the 18th day of November, 1936, in a proceeding before said Commission known as No. 26903, and for the purpose of enjoining, setting aside and annulling a certain certificate, more particularly hereinafter described, issued by said Interstate Commerce Commission on the same date in a proceeding before said Commission known as Finance Docket No. 11025.

In that behalf plaintiff alleges and shows:

I

That plaintiff is a corporation organized and existing under the laws of the state of Michigan, with principal office and principal operating office at Wells, Michigan, in the Western District of Michigan, Northern Division.

That plaintiff is a common carrier engaged in the transportation of freight and passengers in state and interstate commerce, and as such common carrier so engaged is sub-

ject to the Act of Congress known as the Interstate Commerce Act (Title 49 U. S. Code) and acts supplemental thereto and amendatory thereof.

[fol. 3]

II

That this suit is brought and the United States of America is made defendant herein pursuant to the provisions of Sections 41 to 48, inclusive, of Title 28 U. S. Code, chapter 2.

That respondent, Interstate Commerce Commission, is a Commission created and established by Section 11 of said Interstate Commerce Act and having the jurisdiction and authority conferred by the terms of said Act and acts supplemental thereto and amendatory thereof. Said Interstate Commerce Commission is made a party defendant hereto pursuant to the provisions of Section 45a of said Title 28 United States Code, chapter 2, and is hereinafter referred to for convenience as the Commission.

III

That Chicago, Milwaukee, St. Paul & Pacific Railroad Company is a corporation, and Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees, are in charge of the property and operating the business of said corporation by appointment of the United States District Court for the Northern District of Illinois. The said corporation and its trustees hereinafter for convenience are referred to at times as the Milwaukee Road.

That Chicago and North Western Railway Company is a corporation, and Charles P. Megan, Trustee, is in charge of the property and operating the business of said corporation by appointment of the United States District Court for the Northern District of Illinois. The said corporation and its trustee hereinafter for convenience are referred to at times as the North Western Road.

That the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago and North Western Railway Company were, on and prior to the 12th day of March, 1935, engaged in the interstate transportation of passengers and property as common carriers by railroad, and as such common carriers were subject to the terms of said Interstate Commerce Act.

[fol. 4] That on dates subsequent to said 12th day of March, 1935, the trustees above named were appointed to

be in charge of the said properties and operating the business of said companies, and as so engaged said trustees were and are subject to the terms of said Interstate Commerce Act.

That Escanaba, Iron Mountain & Western Railroad Company is a corporation organized and existing under the laws of the state of Michigan and owns a line of railroad which extends from Iron Mountain, Michigan, to the docks owned and operated by the said North Western Road at Escanaba, which said line is and for some years last past has been under lease to and operated by the aforesaid North Western Road.

IV

That on to wit: the 12th day of March, 1935, the aforesaid Chicago and North Western Railway Company, Escanaba, Iron Mountain & Western Railroad Company, and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed a certain application with the Commission, which was docketed as No. 26903, seeking an order by said Commission in substance authorizing the said applicants to pool ore traffic and divide the earnings therefrom between the Menominee Range and docks at Escanaba, substantially as provided for in an agreement between the parties to said application, of which agreement a copy was attached to their aforesaid application. That the aforesaid application was filed by said applicants without notice to plaintiff and without plaintiff's consent or assent thereto.

That subsequently, by appropriate petitions, the aforesaid trustees of the Milwaukee Road and North Western Road joined in said application.

That the written agreement between said applicants, as submitted with their aforesaid application also provided for the pooling of other traffic than iron ore, namely, class and commodity traffic in which plaintiff participates, as more fully described in said agreement.

That thereupon the Commission instituted its proceeding of investigation, and after hearing the application was denied in a report (210 I. C. C. 599) and order entered September 24, 1935.

[fol. 5] V.

That thereafter upon petition of said applicants, without the consent or assent of plaintiff, the aforesaid proceedings

under Docket No. 26903 were reopened by order of the Commission entered February 8, 1936.

VI

That aforesaid Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed with the Commission on the 29th day of November, 1935, its contingent application for a certificate of public convenience and necessity in substance seeking permission for abandonment of operation, under trackage rights, over the line of the Escanaba and Lake Superior Railroad Company between Channing and Escanaba, Michigan, and for an order authorizing pooled use and operation of certain tracks and facilities in Michigan and Wisconsin, as more fully set forth in said application, which was docketed by said Commission as Finance Docket No. 11025.

That thereafter the Commission conducted hearings in said Docket No. 26903 and Finance Docket No. 11025, which were heard on one record. Plaintiff participated in said hearings in opposition to both applications and was an intervener in both proceedings.

VII

That thereafter, on November 18, 1936, the Commission issued its report, in mimeograph form, which said report is entitled in No. 26903 and as also embracing said Finance Docket No. 11025. Attached to said report were an order of the same date entitled in Docket No. 26903 and a certificate of public convenience and necessity, bearing no date, and entitled in Finance Docket No. 11025.

This order and this certificate are sought to be set aside in this cause.

A true copy of said report, order and certificate is attached to this petition as Appendix 1 hereto and made a part hereof as fully as though set forth at length herein.

VIII

Plaintiff alleges that the said order of November 18, 1936, in said proceeding, No. 26903, is arbitrary, beyond the power [fol. 6] of the Commission, and void for the following reasons:

(a) Because it authorizes the pooling of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Michigan, for transshipment beyond in interstate commerce, and the division of the aggregate or net proceeds of the earnings of the railroads thereon, in which traffic and earnings your plaintiff is a carrier involved, but plaintiff has not assented to said division of traffic or earnings and has not joined in said pooling application or arrangement, but on the contrary objects thereto, and therefore the Commission has no jurisdiction to authorize or approve the same in view of the provisions of paragraph (1) of Section 5 of the Interstate Commerce Act;

(b) Because it authorizes the pooling of interstate class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company and for division of earnings thereon, in which traffic and earnings your plaintiff is a carrier involved, but plaintiff has not assented to said division of traffic or earnings and has not joined in said pooling application or arrangement, but on the contrary objects thereto, and therefore the Commission has no authority to authorize or approve the same in view of the provisions of paragraph (1) of Section 5 of the Interstate Commerce Act;

(c) Because the aforesaid pooling plan and arrangement was not shown by the applicants to be in the interest of economy of operation, or in the interest of better service to the public.

(d) Because the aforesaid pooling plan and arrangement, both as regards said ore traffic and the division of earnings thereon and said class and commodity traffic and the division of earnings thereon, will unduly restrain competition, in violation of the terms of said Interstate Commerce Act.

(e) Because the aforesaid pooling arrangement and division of earnings on class and commodity traffic to and from points on plaintiff's line and division of earnings thereon will result in violations of paragraph (3) of Section 3 of said Act, to the injury of plaintiff.

[fol. 7] IX

Plaintiff further alleges that said certificate of November 18, 1936, in said proceeding known as Finance Docket No. 11025, is arbitrary, beyond the power of the Commission, and void for the following reasons:

(a) Because it purports to authorize the abandonment by the applicant, Milwaukee Road, of operation under trackage rights over the plaintiff's line of railroad in Dickinson, Marquette, and Delta Counties, Michigan, without any proof that the present and future public convenience and necessity will permit of said abandonment;

(b) Because said authorization is not limited to abandonment of operation in interstate and foreign commerce;

(c) Because there was no evidence before the Commission that public convenience and necessity would permit of such abandonment.

In consideration whereof, and inasmuch as your plaintiff has no adequate remedy at law and may have relief only in a court of equity, plaintiff prays that this petition be received and filed, that writs of subpoena be issued by the Clerk of the Court, as provided by law, commanding the United States of America and Interstate Commerce Commission to appear and defend this action; that notice hereof be given to the Attorney General of the United States and to the Interstate Commerce Commission, as provided by statute; that upon the filing of this petition the Judge of this Court call to his assistance two other judges, at least one of whom shall be a Circuit Judge, and that upon due notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission, a decree be entered, upon final hearing of this case, adjudging the said order and certificate entered November 18, 1936, to be in all respects null and void and permanently annulling and setting aside the same; and for such other and further relief in the premises as the nature of the case shall require and to this Court shall seem meet.

Clark M. Robertson, John S. Burchmore, Solicitors for Plaintiff. Upham, Black, Russell & Richardson, Wells Building, Milwaukee, Wisconsin. Walter, Burchmore & Belnap, of Counsel, 2106 Field Building, Chicago, Illinois.

[fol. 8] *Duly sworn to by Emmet L. Richardson. Jurat omitted in printing.*

[fol. 9] APPENDIX 1 TO PETITION

Interstate Commerce Commission

No. 26903[1]

Pooling of Ore Traffic in Wisconsin and Michigan

In the Matter of Application of Chicago and North Western Railway Company, Escanaba, Iron Mountain & Western Railroad Company, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company for Authority to Pool Ore Traffic from Menominee Range to Docks at Escanaba, Mich., and to Divide Earnings Therefrom

Submitted September 26, 1936. Decided November 18, 1936

1. Proposed contract between the Chicago & North Western Railway Company, Escanaba, Iron Mountain & Western Railroad Company, and the trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company providing for the pooling of interstate ore traffic from the Menominee Range in Michigan and Wisconsin to Escanaba, Mich., and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and the division of earnings, therefrom, approved. Prior report 210 I. C. C. 599.

2. Certificate issued permitting abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights over the Escanaba & Lake Superior Railroad Company's line of railroad in Dickinson, Marquette, and Delta Counties, Michigan.

Appearances as in 210 I. C. C. 599; also Arthur J. Lovell, for interveners.

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[1]This report also embraces Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment of Operation.

Report of the Commission on Further Hearing

Division 4, Commissioners Meyer, Porter, and Mahaffie

By Division 4:

Exceptions to the report proposed by the examiner were filed by the Escanaba and Lake Superior Railroad Company, and the issues were orally argued.

In the original report in No. 26903, 210 I. C. C. 599, division 6 considered an application for approval of a contract between the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter termed the North Western and the Milwaukee, respectively, providing for the pooling of in- [fol. 10] terstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, hereinafter termed the Escanaba Company, and for the division of earnings therefrom. The application was denied without prejudice to the filing of another application under section 5(1) of the Interstate Commerce Act after a certificate of convenience and necessity had been obtained permitting the abandonment of operation involved or the filing of an application under section 5(1) at the time of filing the application for such a certificate. The Milwaukee transports the ore traffic over the line of the Escanaba Company between Channing, Mich., and Escanaba, under a trackage right contract which does not expire until January 1, 1951. The abandonment by the Milwaukee of the use of the Escanaba Company's tracks is incidental to the operation of the pooling plan.

Accordingly, application was filed on November 29, 1935, for a certificate of public convenience and necessity permitting the abandonment by the Milwaukee of this operation between Channing and Escanaba, 63.5 miles, and for an order authorizing a pooled use and operation of certain tracks and facilities in Iron, Dickinson, Menominee and Delta Counties, Mich., and Florence County, Wis. This application is recorded in Finance Docket No. 11025 and was heard with the application in No. 26903 which was reopened for further hearing.

Since January 1, 1936 the Milwaukee has been in the custody of trustees appointed in reorganization proceedings under section 77 of the Bankruptcy Act, as amended. Subsequent to the filing of the application in Finance Docket No. 11025, a supplemental application was filed reciting appointment of Henry A. Scandrett, Walter J. Cummings, and George I. Haight, as trustees of the Milwaukee, and requesting that they be made parties applicant in the proceeding. Also the trustees of the Milwaukee filed a motion immediately preceding the further hearing in No. 26903 requesting that they be joined as parties applicant in that proceeding. The North Western was not represented at the further hearing, which related principally to the abandonment under consideration. Later, Charles P. Megan, trustee for the North Western also filed a motion requesting substitution as a party applicant. The North Western has been in trusteeship since June 28, 1935. No objection was made to these motions. These trustees have been made parties to these proceedings.

The Escanaba Company intervened in opposition to the proposed abandonment of operation, and the proposal is opposed also by the cities of Escanaba and Iron Mountain, Mich., the chambers of commerce of those communities, the village of Channing, the supervisors of Delta County, representatives of the carriers' employees, and residents of the territory tributary to the line of Escanaba Company.

The first contract granting the Milwaukee trackage rights over the rails of the Escanaba Company for 20 years was made in 1900. At that time the line was a logging road extending about 31 miles from Escanaba to Watson, Mich. A condition contained in that contract required the extension of the Escanaba's rails from Watson to Channing. This condition which was later fulfilled, consummated the contract. Before the expiration of the first contract the present one was executed covering the period from January 1, 1921, to January 1, 1951.

[fol. 11] It appears desirable that certain of the basic facts recited in the original report be repeated. The Milwaukee has a line running north from Iron Mountain, to Channing, 24.1 miles, thence west to Kelso Junction, Mich., 7.8 miles, thence northwest to Amasa, Mich., 12.4 miles and beyond to Ontonagon, Mich. Regular freight and passenger service to and from Channing is maintained over those

lines. It also has a line running northeast from Iron River, Mich., to Channing. All ore now handled by it from the Menominee Range is concentrated in its own yards at Channing, whence it is moved by its own power and crews, under trackage right over the rails of the Escanaba Company to Escanaba where it is delivered to the docks, which will presently be described. The Milwaukee also has the right under the contract to use the line of the Escanaba Company running southeasterly from Wells Junction through Wells in the immediate vicinity of Escanaba. Ore trains of the Milwaukee move to a point just south of Wells Junction where they enter the yard of the Milwaukee. The Milwaukee is also privileged under the contract to handle certain coal outbound from its docks located immediately north of its ore docks; and also it may handle company construction material between Channing and its docks at Escanaba. It does not operate any scheduled service and has no station at any point on the line of the Escanaba Company.

The Milwaukee owns two ore docks at Escanaba, known as docks 1 and 2, which were built in 1901 and 1902, respectively, and which have not been reconstructed. In 1934 it used its dock 2. This it was able to do by making temporary repairs costing approximately $30,000 and because the traffic that year was very light. But the Milwaukee's docks since that time have deteriorated to such an extent that they have not been usable. In the last year it has been using the North Western's docks on the same terms agreed to in the proposed pooling contract. At the time of the further hearing the ore season had not opened for the year 1936. Under the proposed plan the Milwaukee would be accorded the use of the North Western's dock at Escanaba for the handling of ore from the Menominee Range.

The proposed contract provides that the Milwaukee shall handle with its road trains and crews ore from the mines in the vicinity of Amasa, in the Menominee Range, over its own line to Iron Mountain, where the ore would be delivered to the North Western. All other ore from the Menominee Range would be handled by the road trains and crews of the North Western from production points to Escanaba over its own rails. From Iron Mountain to Escanaba the loaded ore cars would move over the line of the Escanaba, Iron Mountain and Western Railroad Company, a subsidiary of the North Western, and the empty cars would move back from Escanaba to Iron Moun-

tain over the line of the North Western. This arrangement would virtually furnish a double track movement, although slightly longer than the present route, as these lines nearly parallel each other between the points indicated. The details of this proposed operation are contained in the contract.

Most of the mines in the Crystal Falls and Iron River districts, within the Menominee Range, are served by both the Milwaukee and North Western over jointly owned mine tracks. A few of the mines are served by tracks owned by either one or the other of those companies. At some mines the Milwuakee performs all the switching for [fol. 12] both roads, and at others the North Western performs all of the switching. Under the present arrangement it is the practice of the ore shippers in this producing area to divide their tonnage between the two lines. When shipment over one line is temporarily discontinued and begun over the other line the carrier that has been hauling the ore moves its switch engines and equipment, making way for the operations of the other carrier. Under the proposed plan the shifting of switch engines and equipment by the respective carriers as described would be discontinued.

The ore is of varying grades and the prevailing practice is to mix ore at the docks in order to obtain a definite chemical combination or grade for each cargo. Each car of ore is sampled at the mine as it is loaded and the disposition of it thereafter is controlled by the results of the sample and the use that can be made of it in building up the definite cargo content desired. When the Milwaukee used its own docks, it maintained a switch engine at its yards for breaking up ore trains, placing loads on the dock for unloading, and removing and assembling the empties for trains returning to Channing. In 1932, 1933, and 1935, when the Milwaukee used the North Western's dock, the latter performed the switching at the dock and its engines went into the Milwaukee's yards, classified the ore, and moved it to the North Western's dock after the cars were ordered by the dock agent. It is more economical to switch ore from the North Western's yards than from the Milwaukee's yards to the dock of the North Western.

All revenues from ore traffic from the Menominee Range transshipped through the dock of the North Western at

Escanaba would be apportioned upon the division of the business obtaining during the ten-year period 1923 to 1932 which was 34 per cent to the Milwaukee and 66 per cent to the North Western. The expenses directly connected with the movement of the ore would be divided upon the same percentages as the revenues. Locomotives and cars for the movement would likewise be furnished upon the same percentages. Savings as determinable in advance of pooling, and mainly as derived from discontinuance of the use of the facilities of one of the carriers would be divided approximately equally between the two parties. Other savings resulting from consolidation of operations over a single line, and through one set of facilities, would be divided between the two parties approximately upon the division of revenues and the direct operating expenses. It appears that some of the savings could be calculated definitely, while others could only be approximated.

In 1935, the first ore was handled on April 23 and the last on November 18. Between the dates indicated, 210 days the Milwaukee handled 79 trains over the line of the Escanaba Company. The average tonnage for the 79 trains was 8,872 tons, including also the weight of the equipment. The average annual shipments of ore from the Menominee Range during the 10-year period 1923 to 1932 were 4,074,869 tons of which 1,391,443 tons or 34 per cent moved by the Milwaukee and the remainder, 2,683,426 tons by the North Western. During the same period all of the ore over the Milwaukee was handled through the docks at Escanaba and 3,191,934 tons, part of which came from the Marquette Range, moved by the North Western to Escanaba and were handled through the docks at that point. In 1935, 1,633,879 tons of ore moved from the Menominee Range of which 28.5 per cent or 465,602 tons moved by the Milwaukee and 1,168,277 tons [fol. 13] moved by the North Western. In that year a total of 1,823,655 tons of iron ore moved to the docks at Escanaba. The movement in 1935 from the Menominee Range over the Milwaukee was about 165,000 tons less than in 1934 and about 38,000 less than in 1933.

Under the present contract the Milwaukee is obliged to pay to the Escanaba Company $27,000 per annum as a fixed minimum rental until January 1, 1951, and in addition thereto amounts on a tonnage, or so-called wheelage basis, including a pro rata share of the operation ex-

penses, taxes, and additions and betterments. The average annual payment of the Milwaukee to the Escanaba Company on account of the trackage rights on the ore traffic during the 10-year period from 1923 to 1932 was $181,226, and for the 5-year period from 1931 to 1935, $79,555. The detailed items included in these payments are maintenance of way and structures; transportation other than train; taxes; amortization and interest on additions; current betterments; and such amounts of rental as the pro rata proportion of the use of the line of the Escanaba Company bore to the number of miles run by the cars and engines of both companies operating over the tracks of the Escanaba Company, during each year, subject to a minimum rental of $27,000.

If the Milwaukee were to continue handling ore to docks, it would be necessary to rebuild its No. 1 dock at an estimated cost of $1,000,000. Under present financial conditions, the Milwaukee would have difficulty in obtaining the funds for that purpose, and were it possible so to do, the wisdom of such an investment might be questionable in view of the prospective ore tonnage. The new dock would cost the Milwaukee annually about $110,000 for interest, depreciation, maintenance, taxes, and fire insurance and protection. The average annual cost to the Milwaukee in similar items for use of the North Western's dock under the terms of the contract is estimated at approximately $46,000. One of the North Western's docks has an estimated remaining life of 15 years.

Approval of the proposed plan would allow the Milwaukee to salvage its ore yards and its tracks to the docks at Escanaba which would result in a saving of $4,225 per year, and under the terms of the pooling contract it is estimated that one-half or $2,112 would represent the amount saved by the Milwaukee. Based upon the 10-year period prior to 1932, the Milwaukee would save, in maintenance of way and structures not due to use, approximately $41,950 in connection with the line-haul service from the Range to the dock. To these figures when adding the amount of rental over the minimum until 1951, taxes and general expenses, estimated savings annually of $76,845, of which 50 per cent, or $38,423, could be assigned to the savings to the Milwaukee under the terms of the proposed pooling contract. Under that contract there would also be eliminated maintenance not due to use in connec-

tion with the tracks and yards on the Range, $5,000; interest on so-called salvage, $800; and taxes of $200, or a total saving of $6,000, of which 50 per cent, or $3,000, would accrue to the Milwaukee. These savings to the Milwaukee, so long as the present North Western dock is in use, would total $109,675 per annum. Other savings under the proposed plan can not be reduced to figures but would be accomplished by joint handling of the ore tonnage through the docks, from joint or consolidated switching on the Range or at intermediate points, and of train service between the Range and the docks. There would also be substantial savings to the Milwaukee in the reduction in the number of ore cars required.

[fol. 14] The Milwaukee's operating revenues declined from $142,569,632 in 1930 to $84,900,833 in 1932, but since that year have risen to $87,859,792 in 1934; and $92,473,793 in 1935. In this period the system sustained net losses aggregating almost $90,000,000.

One provision of the contract as to pooling of traffic provides that the revenues of the Milwaukee and the North Western on traffic interchanged with the Escanaba Company shall be pooled. Under this proposed arrangement a study of the 6-year period, 1927 to 1932 is to be made and the total revenue accruing to each company on business interchanged by the Milwaukee and the North Western with the Escanaba Company is to be determined. From the total business amount interchanged by the Milwaukee with the Escanaba Company an amount equal to 10 per cent is to be deducted. The relation between the remainder and the total of such remainder, plus the revenue of the North Western, is then to be determined. Thereafter, the total revenues derived by each company from traffic interchanged with the Escanaba Company, less an amount of 30 per cent of such gross revenues to cover cost of handling by either company, is to be put into a pool and divided on the basis of the percentages established for the 6-year period. For the 6-year period 1927 to 1932, the total net revenue on traffic to and from points on the line of the Escanaba Company, accruing to the Milwaukee was $766,645 and to the North Western $992,290.

Under another provision of the contract the North Western agrees to join with the Milwaukee in establishing appropriate joint rates and divisions for handling interline traffic via Iron Mountain, so as to permit the Milwaukee

to continue handling traffic to and from industries served by the Escanaba Company, either direct or through reciprocal switching arrangements with the North Western. All such traffic interchanged at Iron Mountain would be included in the foregoing pool the same as traffic interchanged at Channing. The provision in the contract regarding the establishment of joint rates between the Milwaukee and the North Western on traffic interchanged with the Escanaba Company would seem to contemplate that at some later time the Escanaba Company might be abandoned west of Gross or west of Northland, thus discontinuing the only connection, at Channing, with the Milwaukee. This subject will be discussed in connection with the opposition presented by the Escanaba Company.

The line of the Escanaba Company connects with the line of the Minneapolis, Saint Paul & Sault Ste. Marie Railway Company at North Escanaba but the latter line is principally an east and west railroad and any route by that line to Chicago, Ill., or lower Wisconsin destinations would be circuitous and not ordinarily used. Discontinuance of service by the Escanaba Company on the part of its line into Channing would necessarily destroy the competitive nature of this class and commodity traffic interchanged with the Escanaba Company. Under the proposed contract this traffic may be hauled by either the Milwaukee or the North Western and it is provided that joint rates will be established between these two lines through Iron Mountain; only the revenue is to be pooled. In 1935 the revenues on interline traffic interchanged with the Milwaukee at Channing was $69,884 and interchanged with the North Western at Escanaba, $68,706. Such revenues would not be affected, so long as the Escanaba Company continues its present plan of operation.

[fol. 15] The Escanaba Company contends also that the Milwaukee's application for permission to abandon operation is conditional and that the North Western has not complied with the provisions of section 1 (18) by seeking permission to abandon its Amasa branch, which would be necessary to make effective the proposed plan. The Milwaukee's application is definite and certain. It seeks the abandonment under consideration only if the pooling arrangement is approved. The North Western has not tested the merits under section 1 (18) of abandoning its Amasa

branch but intends to file an application at the appropriate time for permission to abandon that branch.

The Escanaba Company fears that the abandonment of the use of its line for ore trains would jeopardize its revenues to such an extent as to lead to the abandonment of its line except possibly a small section thereof east of Groos. It has 18 stations which are the following distances in miles from Wells: Escanaba, 4; Groos, 2; Lamber, 5.5; Chandler, 9.5; Salva, 12; Cornell, 13.5; Woodlawn, 18; Hendricks Tank, 21; Hendricks, 22; Mashek, 29.5; Reade, 33.5; Northland, 36; Alfred, 38.5; Savards, 41.5; Ralph, 46.5; Turner, 52.5; Golden, 59; and Channing, 63.5. The territory adjoining the tracks of the Escanaba Company was once heavily timbered. Most of the heavy timber has been cut out and the territory has been settled by farmers to some extent and small communities have sprung up near some of the stations. Ralph, Northland, and Watson each have about 75 to 80 people. The farmers supplement their earnings by cutting small timber. The territory adjoining the tracks of the Escanaba Company is sparsely settled and the growth of agriculture has been slow. In 1935 the 18 intermediate stations on that line originated 46 carloads of potatoes, 5 carloads of sugar beets, 1 carload of hay and grain, and 1 carload of machinery, or a total of 53 carloads, 974 tons. The forest products that year amounted to 544 carloads. From 1931 to 1935 the Escanaba Company hauled 2,112,580 tons, 62,229 carloads, of carload freight, and 13,914 tons of less-than-carload freight, or a total of 2,126,491 tons. By years, in order, the total freight hauled amounted to 463,664, 325,265, 339,997, 473,706, and 523,862 tons, and 13,383, 9,584, 11,333, 13,383, and 14,758 carloads. According to commodities the carloads were divided as follows: Forest products, 32,042; manufactures and miscellaneous, 16,634; coal, 9,213; ore, 1,350; other products of mines, 1,465; products of agriculture, 981; and animals and animal products, 544. Forest products comprised 51 per cent of the total. This movement by years, in order, was 7,590, 3,964, 5,502, 7,249, and 7,737 carloads. Freight originating at stations between Groos and Channing amounted to 1,424 cars in 1934 and 1,696 cars in 1935, or a total of 3,120, of which 2,133 moved to local points and 987 to off-line destinations. All but 102 carloads were forest products.

The Escanaba Company fears that as the timber tributary to its line becomes exhausted, the remaining traffic available will be insufficient to yield revenues to support the cost of operation. Practically all the virgin timber has been cut, and while one large company has approximately six million feet available for shipment, half of this is to be cut by settlers instead of the owner.

In 1923 this carrier sustained a net loss of $25,048, but earned net income in each of the succeeding twelve years, 1924-1935. These net earnings ranged from $14,180 to $138,447, and aggregated $965,739 or over $80,000 per year. In each of the years 1933-35, in order, its net income [fol. 16] amounted to $69,703, $72,866, and $69,218. During the years 1923-33 the intervener paid dividends aggregating 115 per cent and paid off all its funded debt. Dividends of 10 per cent were paid in 1934 and 1935.

The Escanaba Company has undertaken by exhibits to adjust its income statements for 1934 and 1935 to indicate the effect of abandonment of operation by the Milwaukee over its line. These adjustments include in operating expenses proportions paid by the Milwaukee, and exclude from non-operating income all sums received from the Milwaukee as joint-facility rents. On this basis it is calculated that, without the support received from the Milwaukee for use of its line under the trackage agreement in the years 1931-35, the Escanaba Company would have sustained losses amounting to $61,893, $36,220, $5,548, $9,448, and $5,653, respectively. These calculations do not take into consideration the payments which the Milwaukee would have continued to make under the agreement had the proposed abandonment of operation occurred at the end of 1930, or the possible savings in the expense of maintenance had the Milwaukee's ore trains ceased to operate over the line subsequent to that year.

A witness for the Milwaukee experienced in the study of the earning capacity of system branch lines expressed the opinion that the Escanaba Company can continue operation for years by virtue of economies in maintenance expenditures and reduced train service, and that if and when further relief were needed, the portion of its line from Channing to Northland, 27.5 miles, might first be abandoned and the remainder operated on a self-sustaining basis, as a branch from Northland to Escanaba and Wells.

On behalf of employees of the Milwaukee and the Escanaba Company it is argued that to approve the proposed plan would result in loss of employment and loss of investment in homes, and that before the plan is approved the Milwaukee should agree to indemnify employees against such losses. We have heretofore said that in abandonment proceedings under section 1(18) we are without power to attach any conditions except as required by public convenience and necessity. Chicago G. W. R. Co. Trackage, 207 I. C. C. 315.

Protests of individuals, communities, and commercial organizations are founded on the assumption that service by the Escanaba Company will terminate, eventually if not in the near future, under the proposal of the Milwaukee. Testimony adduced on their behalf is directed to the need for such service and the injury such an abandonment would impose upon the public contrasted with the benefits which would flow to the Milwaukee. Many witnesses residing in villages or communities along the line of the Escanaba Company testified that abandonment of their only railroad service would impair their life's savings invested in homes, deprive them of a means of marketing their crops, and possibly compel them to move and start over again. Escanaba has a population of 14,524 persons and the population along the line of the Escanaba Company is 6,303. Persons along the eastern 40 miles of the Escanaba Company trade at Escanaba. In 1930, $8,665,000 worth of retail business was transacted by Escanaba merchants. Traffic moving to and from Escanaba, Wells and Groos is competitive. The service between Escanaba and Chicago via Channing has been placed upon a competitive basis with that of the North Western.

[fol. 17] The pooling plan as to traffic other than the ore traffic is intended as insurance of revenue to the Milwaukee which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of the line of the Escanaba Company and is merely incidental to the pooling of the ore traffic. There is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the public; that costs of operation will be reduced, or that competition will be unduly restrained. However, according to the record, the earnings of the Escanaba Company on this traffic and serv-

ices to the public would in no way be affected by the proposed division of earnings by applicants so long as traffic originating at, or destined to, points on the Escanaba is handled as at present.

In the operation of ore trains via Channing, the line of the Escanaba Company is now only an intermediate link between the Milwaukee and the North Western, and the latter carrier operates only as a switching line. The original use of the line of the Escanaba Company for the transportation of ore traffic contemplated the use of the Milwaukee docks. Abandonment of the Milwaukee docks and some restraint of competition as a consequence, is already a reality and it appears that the amount of ore traffic that is likely to move does not warrant the maintenance of ore docks by both the North Western and the Milwaukee. The Milwaukee and the North Western can not be required to continue the service embracing the line of the Escanaba Company merely because of the undesirable effect of the discontinuance thereof upon the revenue of that company.

Section 5(1) is specific in setting out jurisdictional findings of fact which are prerequisite to our approval of a pooling agreement. One of these is that the agreement must be "assented to by all the carriers involved * * *." The Escanaba Company contends that it is a carrier involved within the meaning of the act, and since it has not assented to the pooling agreement, we do not have jurisdiction to approve and authorize the agreement. It is therefore necessary to determine whether the Escanaba Company is a carrier involved within the meaning of the act. As pointed out in the original report, the Escanaba Company never participated as a carrier in the ore traffic in the past. Its status was that of a lessor of trackage rights to the Milwaukee. It does not now participate in this traffic as a carrier. Under these circumstances, it cannot be considered a carrier involved in the pooling agreement now before us. It necessarily follows there that the carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanaba Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard.

We find that the proposed pooling arrangement considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the contract; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable.

[fol. 18] We further find that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation under trackage rights over the line of the Escanaba and Lake Superior Railroad Company in Dickinson, Marquette, and Delta Counties, Mich., described in the application recorded in Finance Docket No. 11025.

An appropriate order and certificate will be issued effective as to the abandonment of operation from and after 30 days from the date thereof. Suitable provision will be made therein for the cancelation of tariffs.

[fol. 19] Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of November, A. D. 1936

No. 26903

In the matter of the Application of Chicago and North Western Railway Company; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for Authority to Pool Ore Traffic from the Menominee Range to Docks at Escanaba, Mich., and to Divide the Earnings Therefrom

It appearing That the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees, filed a joint application under section 5 (1) of the Interstate Commerce Act for approval of a contract pro-

viding for the pooling of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract;

It further appearing, That on September 24, 1935, division 6 upon full investigation of the matters and things involved made and filed its report and order in the above-entitled proceeding and subsequently upon appropriate petition reopened the said proceeding for further hearing in connection with Finance Docket No. 11025, Chicago, Milwaukee, St. Paul and Pacific Railroad Company Trustees Abandonment of Operation;

And it further appearing, That there has been a full hearing of the matters and things involved in the said pro-
[fol. 20] ceeding and that the division, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon, which said report and report on further hearing are hereby referred to and made a part hereof:

It is ordered, That the pooling by the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees, of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract referred to in the report, be, and it is hereby, approved and authorized.

[fol. 21] Certificate of Public Convenience and Necessity

Finance Docket No. 11025

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Trustees Abandonment of Operation

Investigation of the matters and things involved in this proceedings having been made, and said division having, on

the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation, under trackage rights, over the Escanaba and Lake Superior Railroad Company's line of railroad in Dickinson, Marquette, and Delta Counties, Michigan, as described in the application and said report.

It is ordered, That this certificate and order shall take effect and be in force, as to the abandonment of operation herein authorized, from and after 30 days from its date. Affected tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

And it is further ordered, That said trustee, when filing schedules canceling the tariffs shall in such schedules refer to this certificate by title, date, and docket number.

By the Commission, division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, FOR LEAVE TO INTERVENE

To the Honorable Judge of the United States District Court, For the Western District of Michigan, Northern Division:

Now come Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in accordance with the provisions of Section 212, 213, of the

Judicial Code (U. S. C. A. Title 28, Sec. 45 (a)), and represent that they have an interest in the matters involved in this proceeding and desire to intervene and be made parties defendant. In support of their petition, the Petitioners show

I

Petitioners, Henry A. Scandrett, Walter J. Cummings and George I. Haight, are the duly appointed and acting Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, pursuant to order of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in Cause No. 60463 in said Court, for the reorganization of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, under Section 77 [fol. 23] of the Bankruptcy Act, and as Trustees of said Chicago, Milwaukee, St. Paul and Pacific Railroad Company, are engaged in the operation of the lines of railroad of said company as a common carrier of passengers and property for hire within the States of Wisconsin, Michigan and other states.

II

That said Chicago, Milwaukee, St. Paul and Pacific Railroad Company and said Trustees were parties applicant to the proceeding before the Interstate Commerce Commission in said Docket No. 26903 and Finance Docket No. 11025, and desire to appear in this cause and be represented by their counsel.

Wherefore, your Petitioners pray that leave be granted them to intervene in and be made parties defendant in the above entitled cause, and that they may have such other and further relief in the premises as may be meet.

Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by O. W. Dynes, C. R. Sutherland, Their Solicitors, 888 Union Station Bldg., Chicago, Illinois.

[fol. 24] *Duly sworn to by Henry A. Scandrett. Jurat omitted in printing.*

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA

United States of America, one of the defendants in the above entitled cause, for answer to the petition filed therein against it, answers and says:

I

United States admits, for the purposes of this suit, that the facts alleged in Sections I, II, III, IV, V, VI, and VII of the petition are true. For full and complete information concerning the facts found and conclusions set forth in the report, order, and certificate of the Interstate Commerce Commission, of November 18, 1936, the Court is respectfully referred to the full text of said report, order, and certificate, which are attached to the petition as Appendix 1, and which are hereby referred to and made a part of this answer.

II

United States denies the matters, things, and conclusions alleged in Section VIII of the petition and the subdivisions thereof, and denies that either the order or the certificate [fol. 26] issued by said Commission November 18, 1936 is unlawful or void for the reasons alleged in said section, or for any other reason.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied, and that the petition be dismissed with costs to the plaintiff, and that it have the benefit of such other and further orders, decrees, and relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. John Dickinson, Assistant Attorney General. Joseph M. Donnelly, United States Attorney.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, hereinafter called the Commission, saving and reserving to itself all benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's petition contained, for answer thereunto, answers and says:

I

Answering paragraph I of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true.

II

Answering paragraph II of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true.

[fol. 28] III

Answering paragraph III of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true.

IV

Answering paragraph IV of the petition, the Commission admits and alleges that on March 12, 1935, the Chicago & North Western Railway Company, hereinafter referred to as the North Western or applicant, the Escanaba, Iron Mountain & Western Railroad Company (a wholly owned and controlled subsidiary of the North Western), and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as the Milwaukee or applicant, submitted an application to the Commission, under section 5 (1) of the Interstate Commerce Act, seeking approval of a contract entered into by them which provided (a) for the pooling of interstate iron ore traffic from the Menominee Range in Michigan and Wisconsin to Escanaba, Mich., the joint use of tracks of the North Western at Escanaba, and the

division of earnings on such traffic, for a period of 99 years; and (b) for the pooling of earnings for a similar period on all other traffic than ore traffic (referred to as class and commodity traffic) originating at or destined to points on the line of the plaintiff, Escanaba & Lake Superior Railroad Company, hereinafter called the Escanaba, from or to points on the North Western or the Milwaukee or carriers connecting therewith and interchanged between the Escanaba and either the North Western at Escanaba, Mich., or the Milwaukee at Channing, Mich. Said application was filed and the proceedings thereon were designated as Docket No. 26903. By petition filed March 30, 1935, the Escanaba prayed leave to intervene in opposition to said application. The Escanaba Chamber of Commerce also filed a similar [fol. 29] petition. By order of March 30, 1935, the Commission granted said petitions. Thereafter the matter of said application was assigned for hearing and was heard at Chicago, Ill., on April 12, 13, 15, and 16, 1935, and evidence was taken (consisting of 576 pages of oral testimony and 35 documentary exhibits). The Escanaba appeared at said hearing, by its counsel, and introduced evidence, examined and cross-examined witnesses and otherwise participated in said hearing. During May and June, 1935, briefs were filed with the Commission by the applicants, by the Escanaba, and by the Escanaba Chamber of Commerce. On September 24, 1935, the Commission, Division 6, rendered its report, entitled No. 26903, Pooling of Ore Traffic in Wisconsin and Michigan, 210 I. C. C. 599, in which it found that all ore now handled by the Milwaukee from the Menominee Range is concentrated in its own yards at Channing, from whence it is removed by its own power and crews under trackage rights over the rails of the Escanaba, about 63 miles, to Escanaba, Mich.; that one of the conditions contained in the aforesaid pooling contract was that the Milwaukee should discontinue operations between Channing and Escanaba over the line of the Escanaba; that the abandonment by the Milwaukee of the use of the Escanaba tracks is the keynote of the pooling agreement, and that without such abandonment the agreement for pooling would not be practical. The Commission concluded and held that before the Milwaukee could lawfully abandon operation over the rails of the Escanaba it would be necessary for it to procure from the Commission a certificate of public convenience and necessity permitting such

abandonment, under section 1(18) of the Interstate Commerce Act, that this had not been done and no application for such certificate had been filed. Therefore, the application for approval of the pooling contract was denied [fol. 30] "without prejudice to the filing of another application under section 5(1), after a certificate of convenience and necessity had been obtained permitting the abandonment sought, or of the filing of an application under section 5(1) at the time the application for such a certificate is filed." A copy of said report of September 24, 1935, marked Exhibit A, is attached hereto and by reference made a part hereof.

V

Answering paragraph V of the petition, the Commission admits and alleges that on November 29, 1935, the Milwaukee filed with it a petition dated November 26, 1935, for reopening and further hearing in said Docket No. 26903, and that by order dated February 8, 1936, the Commission reopened said proceeding and assigned same for further hearing.

VI

Answering paragraph VI of the petition, the Commission admits and alleges that on November 29, 1935, the Milwaukee filed with it an application dated November 25, 1935, under section 1 (18), (19) and (20) of the Interstate Commerce Act, for a certificate of public convenience and necessity authorizing abandonment of its operation under trackage rights over the line of the Escanaba between Channing and Escanaba, in Dickinson, Marquette and Delta Counties, Michigan, and also under section 1 (18) and section 5 (1) of said Act for an order authorizing the aforesaid pooling. This application was filed and the proceedings thereon were designated as Finance Docket No. 11025.

Notice of the filing of this application was given to the Governor of the State of Michigan, to the Governor of the State of Wisconsin, to the Michigan Public Utilities Commission, and to the Public Service Commission of Wiscon- [fol. 31] sin. Notice of the filing of said application was also published for three consecutive weeks in newspapers of general circulation in each county in and through which the Milwaukee operated under trackage rights over the line of the Escanaba.

By petition dated December 20, 1935, the Escanaba prayed leave to intervene in said proceeding, Finance Docket No. 11025, and by order dated January 6, 1936, the Commission granted said petition.

In conformity with the practice in such cases, the Milwaukee, on January 29, 1936, filed its return to questionnaire, in said Finance Docket No. 11025, giving certain detailed information regarding the proposed abandonment.

Thereafter, the Commission assigned said Finance Docket No. 11025 for hearing at Escanaba, Mich., February 26, 1936, and also assigned the aforesaid Docket No. 26903 for further hearing at the same time and place, and said proceedings were then and there heard on one record, and oral and documentary evidence, consisting of 371 typewritten pages of testimony and 17 exhibits, was received. The Escanaba appeared at said hearing by its couns-l and introduced evidence, examined and cross-examined witnesses, and otherwise participated in said hearing. Thereafter, during March, 1936, briefs in said consolidated proceeding were filed by the Milwaukee, by the Escanaba, and by the Escanaba Chamber of Commerce. On May 28, 1936, the Commission's examiner issued a proposed report, to which the Escanaba filed exceptions. On September 26, 1936, oral argument in said consolidated proceeding was heard before the Commission, Division 4, at Washington, D. C. Counsel for the Escanaba appeared and presented argument.

[fol. 32] On January 17, 1936, the trustees of the property of the Milwaukee joined as parties applicant in Finance Docket No. 11025, and on February 18, 1936, said trustees joined as parties applicant in Docket No. 26903. On September 25, 1936, the trustee of the property of the North Western substituted himself for the applicant North Western in Docket No. 26903.

VII

Answering paragraph VII of the petition, the Commission admits and alleges that on November 18, 1936, it issued its report in Docket No. 26903, Pooling of Ore Traffic in Wisconsin and Michigan, which report also embraced said Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees' Abandonment of Operation, and with said report issued an order and a cer-

tificate authorizing the aforesaid pooling and abandonment. A copy of said report and of said order and certificate are attached to the petition as Appendix No. 1.

VIII

Answering paragraph VIII of the petition, the Commission denies that said order of November 18, 1936, in said proceeding No. 26903, is either arbitrary or beyond the power of the Commission or void for the reasons set forth in said paragraph or for any other reason.

Further answering said paragraph VIII and especially subparagraph (a), on page 5 of the petition, the Commission denies that the Escanaba is a "carrier involved" in said pooling of ore traffic within the meaning of that term as used in section 5 (1) of the Interstate Commerce Act and in this connection the attention of the Court is called to the fact, as found by the Commission, that the Escanaba has [fol. 33] never participated as a carrier in the ore traffic and that its status was and is that of a lessor of trackage rights to the Milwaukee; and that the Commission held that—

"Under these circumstances it cannot be considered a carrier involved in the pooling agreement now before us. It necessarily follows here that the carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanaba Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard." (See sheet 9 of the Commission's report of November 18, 1936.)

Further answering said paragraph VIII, and especially sub-paragraph (b), on page 5 of the petition, the Commission denies that the Escanaba is a "carrier involved" in said pooling of earnings as between the Milwaukee and the North Western on the aforesaid class and commodity traffic within the contemplation of section 5 (1) of said Act. In this connection the Commission calls the Court's attention to its finding (report, sheet 9) that "according to the record, the earnings of the Escanaba Company on this traffic and serv-

ices to the public will in no way be affected by the proposed division of earnings by applicants so long as traffic originating at, or destined to, points on the Escanaba is handled as at present." The line of the Escanaba extends from Channing to Escanaba. Its only point of connection with the North Western is at Escanaba and its only point of connection with the Milwaukee is at Channing. All interchange traffic, that is to say, traffic between points on the Escanaba, on the one hand, and points on or reached by way of the lines of either the North Western or the Milwaukee, on the other hand, is now interchanged either at Channing or Escanaba. In the event of the future abandonment of the western portion of the line of the Escanaba now extend-
[fol. 34] ing to Channing, the class and commodity traffic now interchanged between the Escanaba and the Milwaukee at Channing would be lost by the Milwaukee. The plan for the pooling of earnings as between the Milwaukee and the North Western in connection with traffic interchanged with the Escanaba at Channing or Escanaba is intended as insurance of revenue to the Milwaukee now derived from the traffic interchanged with the Escanaba at Channing. Said plan does not involve pooling of any of the earnings of the Escanaba but embraces only the pooling as between the Milwaukee and the North Western of their respective earnings on this traffic interchanged with the Escanaba at either Escanaba or Channing, and the revenues of the Escanaba will in no way be affected.

Further answering said paragraph VIII and especially sub-paragraph (c), on page 5 of the petition, the Commission alleges that in its aforesaid report it found that said pooling arrangement will not impair service to the public and will effect substantial economies in operation, and that these findings are supported by substantial evidence.

Further answering paragraph VIII and especially sub-paragraph (d), on page 5 of the petition, the Commission alleges that in its aforesaid report it found that said pooling arrangement will not unduly restrain competition, and that this finding is supported by substantial evidence.

Further answering said paragraph VIII and especially sub-paragraph (e), on page 5 of the petition, the Commission alleges that said allegation is a mere conclusion of law and that no facts are alleged in the petition from which such conclusion could be drawn, and therefore the Commission
[fol. 35] is not in a position either to admit or deny said

allegation, but to the extent that said allegation may be deemed to be an allegation of fact the Commission denies the same.

Further answering said paragraph VIII, the Commission denies that said certificate of November 18, 1936, in said proceeding known as Finance Docket No. 11025, is either arbitrary or beyond the power of the Commission or void for the reasons there stated or for any other reason.

Further answering said paragraph VIII, and especially sub-paragraph (a) on the 6th page of the petition, the Commission alleges that in its aforesaid report it found that the present and future public convenience and necessity permit the abandonment by the trustees of the Milwaukee of operation under trackage rights over the line of the Escanaba in Dickinson, Marquette and Delta Counties, Mich., described in the application recorded in Finance Docket No. 11025, and that said finding of public convenience and necessity is supported by substantial evidence.

Further answering said paragraph VIII and especially the allegation in sub-paragraph (b) on the 6th page of the petition, that said certificate is not limited to abandonment of operation in interstate and foreign commerce, the Commission alleges that the traffic transported by the Milwaukee under trackage rights over the line of the Escanaba is all interstate or foreign in character, and in this connection the attention of the Court is called to the fact that authority to authorize abandonment of a portion of the operations of an interstate carrier applies to intrastate as well as interstate and foreign commerce.

Further answering said paragraph VIII and especially sub-paragraph (c) on the 6th page of the petition, the Commission denies the allegation that there was no evidence before it that public convenience and necessity would permit of such abandonment.

[fol. 36]

IX

Further answering paragraphs I to VIII, both inclusive, of the petition, the Commission alleges that in the aforesaid proceedings the parties thereto, including the plaintiff herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered by said reports, certificate and order was submitted to the Com-

mission for consideration, including testimony and other evidence submitted on behalf of plaintiff, by counsel for said parties; that in briefs filed in said proceedings and in oral argument questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, and the Commission determined said matters and entered and served upon the plaintiff and upon other interested parties its said reports, certificate and order; that said reports, certificate and order include the Commission's findings of fact, decisions, conclusions, and authorizations in the premises, and that upon the evidence aforesaid the Commission made the findings and stated the conclusions upon which said reports, certificate and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission respectfully refers the Court to the text of its report of September 24, 1935, a copy of which is [fol. 37] attached hereto as Exhibit A, and to its report, certificate and order of November 18, 1936, a copy of which is attached to the petition marked Appendix 1, for full, complete and accurate information concerning the contents thereof.

The Commission further alleges that in making said reports it considered and weighed carefully each fact, circumstance and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including many of the matters covered by the allegations of the petition.

The Commission further alleges that neither said order of November 18, 1936, in No. 26903, nor said certificate in Finance Docket No. 11025, was made and entered by it either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it; that in making said order and said certificate the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said petition.

The aforesaid reports, certificate and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 38] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 39] EXHIBIT "A" TO ANSWER

20656

INTERSTATE COMMERCE COMMISSION

Pooling of Ore Traffic in Wisconsin and Michigan

No. 26903

In the Matter of Application of Chicago & North Western Railway Company, Escanaba, Iron Mountain & Western Railroad Company, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company for Authority to Pool Ore Traffic from Menominee Range to Docks at Escanaba, Mich., and to Divide Earnings Therefrom

Submitted June 15, 1935. Decided September 24, 1935

Application requesting approval of a contract between the Chicago & North Western Railway Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company providing for the pooling of interstate ore traffic and division of the earnings thereon from the Menominee Range in Michigan and Wisconsin to Escanaba, Mich., denied.

Nye F. Morehouse and C. R. Sutherland for applicants.

John S. Burchmore, Luther M. Walter, Nuel D. Belnap, and P. H. Connelly for interveners.

Report of the Commission

Division 6, Commissioners Eastman, McManamy, and Lee

By Division 6:

A proposed report herein was waived and the case was submitted upon the record. The Chicago and North West-

ern Railway Company, hereinafter referred to as the North Western, the Escanaba, Iron Mountain and Western Railroad Company, and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as the Milwaukee, by application filed March 12, 1935, seek approval under section 5 (1) of the Interstate Commerce Act, of a contract which provides for the pooling of interstate iron-ore traffic from the Minominee Range in Michigan and Wisconsin to Escanaba, Mich., the joint use of the North Western's tracks at Escanaba, and division of earnings on such traffic for a period of 99 years. The contract has been executed by all three applicants subject only to our approval.

[fol. 40] The Escanaba and Lake Superior Railroad Company, hereinafter referred to as the Escanaba, and the Escanaba Chamber of Commerce intervened in opposition to the application. At the hearing the following named additional persons entered appearances: Frank E. Hook of the Twelfth congressional district of Michigan, a member of the bar of that State, in behalf of all parties opposing the application, S. A. Boone, for the members of the Brotherhood of Locomotive Firemen and Enginemen employed by the Milwaukee and Escanaba, J. F. Emerson for the Brotherhood of Locomotive Engineers and Railway Trainmen, R. O. Hughes for Order of Railway Conductors, and W. P. Kennedy for Brotherhood of Railroad Trainmen. They were permitted to participate in the hearing and evidence was introduced on behalf of the employees of the Milwaukee and Escanaba.

Considerable testimony dealing with the covenants contained in the agreement for pooling and the savings estimated that will result therefrom was introduced, but, in view of our findings herein, it is unnecessary to set it forth in this report.

The Milwaukee has a line running north from Iron Mountain, Mich., to Channing, Mich., 24.1 miles, thence west to Kelso Junction, Mich., 7.8 miles, thence northwest to Amasa, Mich., 12.4 miles and beyond to Ontonagon, Mich. Regular freight and passenger service to and from Channing is maintained over those lines. It also has a line running northeast from Iron River, Mich., to Channing. All ore now handled by it from the Menominee Range is concentrated in its own yards at Channing, from whence it is moved by its own power and crews, under trackage right

over the rails of the Escanaba, about 63 miles to Escanaba.

The Milwaukee owns two ore docks at Escanaba, known as docks 1 and 2, which were built in 1901 and 1902 respectively and have not been reconstructed. In 1934 it used its dock 2. This it was able to do by making temporary repairs costing approximately $30,000 and because the traffic that year was very light. The Milwaukee's docks have now deteriorated to such an extent that they are not usable. It is using the North Western's docks on the terms agreed to in the pooling contract, but that arrangement does not extend beyond the current year. The Milwaukee also owns and operates yard facilities adjacent to its docks.

The first contract granting the Milwaukee trackage rights over the rails of the Escanaba for 20 years was made in 1900. At that time the Escanaba was a logging road extending about 31 miles from Escanaba to Watson, Mich. A condition was contained in that contract requiring the extension of the Escanaba's rails from Watson to Channing. Before the expiration of the first contract a second [fol. 41] was executed covering the period from December 31, 1920, to January 1, 1951.

A copy of neither contract was introduced but from such evidence as we have it appears that the Milwaukee provides its own terminals at both ends of the rails of the Escanaba and that its use under the trackage rights is restricted to the handling of ore and company material eastbound and coal westbound when for company use, or for the use of the mines served by it on the Menominee Range. The Milwaukee does not serve any local stations on the Escanaba, and all other traffic handled by it moving in connection with the Escanaba is interchanged at Channing. The Milwaukee is obligated to pay the Escanaba $27,180 per year as a fixed rental until January 1, 1951, and in addition thereto amounts on a tonnage, or so-called wheelage, basis. During the 10-year period 1923 to 1932, its average payments, per year, in addition to the $27,180, were $41,950 for maintenance of way and structures, $15,194 rental on a wheelage basis, $15,019 for taxes and $4,682 for general expenses, or a total of $76,845. During 1934, the Milwaukee paid for the same purposes about $50,000. The Escanaba has no direct interest in or control over the traffic or the earnings derived therefrom. It has never participated as a carrier in such traffic. The only interest it has

in the matter is as lessor or trackage rights to the Milwaukee, for which compensation is paid as above stated.

One of the conditions contained in the pooling agreement is:

The Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad and shall discontinue and abandon its yards and other facilities at Escanaba, except its coal dock and tracks appurtenant thereto. The North Western shall, subject to the approval of the Interstate Commerce Commission, discontinue and abandon its Amasa line.

The abandonment by the Milwaukee of the use of the Escanaba tracks is the keynote of the pooling agreement. Without such abandonment the agreement for pooling would not be practical.

Paragraph #18, of section 1 of the act, provides in part, as follows:

• • • no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abondonment.

Paragraph 19, of section 1, provides:

The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of [fol. 42] railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in

each county in or through which said line of railroad is constructed or operates.

Applicants contend that the quoted sections have no application here, pointing out that the Milwaukee is not seeking to terminate its lease; that it will continue to pay the minimum fixed rental of $27,180 a year; that it will retain its right to operate over the rails of the Escanaba; that it has never rendered any service at stations on the Escanaba; that the shippers on the Menominee Range and the public at Escanaba will receive the same service from the Milwaukee that they have heretofore enjoyed; and that the proposed joint operation means only a rerouting of the ore traffic between existing terminals over the rails of the North Western instead of over those of the Escanaba. They also contend that the rerouting of the traffic falls far short of—

> the essentials of abandonment of a line of railroad, and being an essential part of the proposed pooling arrangement may * * * be dealt with by the Commission and disposed of as a part and parcel of such pooling arrangement upon the findings and considerations set up in section 5 (1).

The question of the cancelation of the lease is not before us. The rights and obligations of the parties under the contract is a matter for the courts to determine. Section 5 (1) confers no authority on us to waive the positive requirements of paragraphs 18 and 19 of section 1. Strict compliance with the provisions of paragraph 19 is a condition precedent to the issuance by us of a certificate of convenience and necessity. The question we are here called upon to decide is whether the proposed abandonment is an abandonment of all or any portion of a line of railroad or the operation thereof within the meaning of paragraph 18 of section 1. If that question is answered in the affirmative, approval by us of the application for pooling would be tantamount to countenancing a violation of the act for none of the requirements of paragraphs 18 and 19 of section 1 have been complied with.

In Chicago & A. R. Co. v. Toledo, P. & W. Ry. Co., 146 I. C. C. 171, the Chicago & Alton Railroad Company, hereinafter called the Alton, had entered into an agreement with the Toledo, Peoria & Western Railway Company un-

der which it was granted trackage rights over the rails of the latter from Washington, Ill., for about 12 miles to Peoria, Ill. The Toledo, Peoria & Western had sought to terminate the contract in accordance with the terms thereof. The Alton asked that the Toledo, Peoria & Western be required to permit it to continue the use of the 12 miles of track. The great bulk of the traffic handled by the Alton [fol. 43] over that route was through traffic between Chicago, Ill., and Peoria. It used the tracks of the Toledo, Peoria & Western only as a bridge line. It neither originated nor delivered traffic at points between Washington and Peoria. The Toledo, Peoria & Western was willing to establish joint rates with the Alton over that route and to maintain all existing rates and transit arrangements. Several other routes were available. In that case the Commission said:

Although there is no express reference in these provisions to the extension or withdrawal of operations under lease, it seems clear that such extension or withdrawal is within the intended scope of the statute. The public interest in transportation lies primarily in the operation of railroads rather than in the facilities themselves. Operation under lease may comprise the entire operation of a line or any portion of such operation, and the public interest therein is obvious, the extent varying with the circumstances. It could not be maintained that the word "operation" as here used must be construed to mean exclusive operation, since under such construction it would be possible for joint operators, without securing permission, severally to abandon operation and thus leave the public entirely without service. It is rather to be believed that the word "operation" as used in the statute, has reference to the movement of railroad equipment, through which alone the public is served, and that the word embraces partial operation as well as complete operation. We have never considered the precise question here presented but we have in many cases exercised jurisdiction over the commencement of joint operations under agreements similar to that here before us. In our opinion we have jurisdiction over the abandonment of the "operation" of a railroad under a trackage agreement just as we have over the inception of such an arrangement.

* * * * * * *

As stated, the operation of or over a railroad under an arrangement such as that here considered has the effect of extending the rails and service of the tenant line. In the public interest we can and do take hold of the establishment of such an arrangement, and in the same interest we can and should take hold of its discontinuance. If our jurisdiction in the latter respect is to be limited or circumscribed by the specific provisions of the contract and is only exercisable during the life of the contract as stated on its face, it could be entirely defeated by short-term contracts made renewable at the option of the parties.

We are therefore of the further opinion that the option of the Alton over the track of the T., P. & W. between Dwight and Peoria can not lawfully be discontinued without our certificate; and that the discontinuance of such operation without our authority may be prevented by injunction and is subject to the penalties provided by paragraph (20) of section 1.

Also see Fort Worth & D. C. Ry. Co. Trackage, 170 I. C. C. 677, and Operation by Louisiana & A. Ry., 145 I. C. C. 228.

Following those cases we conclude that the question set forth above should be decided in the affirmative, and that before the Milwaukee may lawfully abandon operation over the rails of the Escanaba from Channing to Escanaba, it [fol. 44] must procure from us a certificate of convenience and necessity permitting such abandonment.

The application will be denied without prejudice to the filing of another application under section 5 (1), after a certificate of convenience and necessity has been obtained permitting the abandonments sought, or the filing of an application under section 5 (1) at the time the application for such a certificate is filed.

An appropriate order will be entered.

EASTMAN, Commissioner, concurring:

I concur in this report because of the controlling decision of the Commission in Chicago & A. R. Co. v. Toledo, P. & W. Ry. Co., 146 I. C. C. 171, a decision with which I did not agree for reasons therein stated at pages 182-185.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, INTERVENING DEFENDANTS

Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendants, now and at all times hereafter saving and reserving to themselves any and all manner or benefit and advantage of exceptions to the many errors and insufficiency in plaintiff's petition contained, for answer to said petition say

I

These defendants admit the facts alleged in Paragraphs I, II and III of the petition.

II

These defendants admit the facts alleged in Paragraph IV of the petition herein except, that, as to the last paragraph thereof, the Interstate Commerce Commission, in its report, entered September 24, 1935, (210 I. C. C. 599 at 604), stated, "The application will be denied without prejudice to the filing of another application under section 5 (1), after a certificate of convenience and necessity has been [fol. 46] obtained permitting the abandonments sought, or the filing of an application under section 5 (1) at the time the application for such a certificate is filed. An appropriate order will be entered.

III

These defendants admit the facts alleged in Paragraphs V, VI and VII of the petition herein.

IV

These defendants deny the allegations made and conclusions drawn in Paragraph VIII of the petition herein, and each and every part of the same in manner and form as alleged.

Wherefore, having fully answered, these defendants pray that the plaintiff's petition be dismissed, and that such further order or orders as may be appropriate be entered by this Honorable Court.

Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by O. W. Dynes, C. R. Sutherland, Their Solicitors.

[fol. 47] *Duly sworn to by Henry A. Scandrett. Jurat omitted in printing.*

[fols. 48-49] Secretary's certificate to proceedings omitted in printing.

[fol. 50] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 26903

In the Matter of the Application of Chicago and North Western Railway Company, Escanaba, Iron Mountain and Western Railroad Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for Authority to Pool Ore Traffic from the Menominee Range to Docks at Escanaba, Michigan, and to Divide the Earnings Therefrom.

APPLICATION—Filed March 12, 1935

The applicants above named respectfully show:

I

The Chicago and North Western Railway Company is a consolidated corporation under the laws of Illinois, Wisconsin, and Michigan; the Escanaba, Iron Mountain and Western Railroad Company is a corporation organized under the laws of Michigan; and is a wholly owned and controlled subsidiary of the Chicago and North Western Railway Company; said last mentioned two corporations are hereinafter collectively referred to as "North Western"; the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation organized under the laws

of Wisconsin and is hereinafter referred to as "Milwaukee."

II

The North Western owns and operates lines of railroad [fol. 51] which extend through and serve territory known as the Menominee Iron Range, located partly in Michigan and partly in Wisconsin, in the vicinity of Iron Mountain, Iron River and Crystal Falls, Michigan, and said lines of railroad extend from the Menominee Iron Range to ore docks of the North Western located in the harbor of Escanaba, Michigan. The Escanaba, Iron Mountain and Western Railroad Company owns a line of railroad which extends from Iron Mountain to said docks of the North Western, at Escanaba, which said line is leased to and operated by the North Western. The Milwaukee owns and operates lines of railroad which also extend through and serve the territory known as the Menominee Iron Range and operates under trackage rights over the line of the Escanaba and Lake Superior Railroad, from a connection at Channing, Michigan, to ore docks of the Milwaukee, also located in the harbor at Escanaba, Michigan, near the docks of the North Western. Both the North Western and Milwaukee own numerous spur, industrial and side-tracks, some jointly and some separately, appurtenant to their respective lines of railroad in the territory of the Menominee Iron Range and used for the purpose of reaching and serving numerous iron mines in that territory and for the purpose of switching cars in the handling of ore traffic to and from the mines in said territory. The North Western and Milwaukee each have yard facilities for the switching of cars handling such ore traffic at Escanaba, Michigan, [fol. 52] adjacent to their respective docks. Heretofore, each of these two companies has separately handled its ore traffic from the Menominee Range to its docks at Escanaba, using exclusively its own motive power and equipment. The ore traffic in question is loaded on lake boats from the respective docks of these two companies, and is moved thence via the Great Lakes to destination points.

III

For the purpose of obtaining greater economy in operation and in the interests of better service to the public, the applicants have agreed upon the execution of a contract,

subject to the approval of the Commission, to pool the entire tonnage of ore traffic moving from the Menominee Range to and through the aforesaid docks at Escanaba and the earnings therefrom, dividing same upon the basis of their respective average participation therein, over the past several years, viz:

Thirty-four Per Cent (34%), Milwaukee and Sixty-six Per Cent (66%), North Western.

Under this agreement, in place of the entirely separate ownership of facilities and operation heretofore carried on, applicants plan arranging facilities and operating in the following manner:

Ownership, Maintenance and Operation of Docks at Escanaba.

[fol. 53] Beginning with the ore season of 1935, the Milwaukee shall discontinue the use of and abandon its docks at Escanaba, which now require rebuilding at large expense to the Milwaukee. The North Western shall continue the use of its present docks—No. 5 during the Year 1935, and No. 6 as long as it shall remain suitable for handling ore—and all ore of both parties shall be handled over said North Western docks. Whenever the parties agree that the construction of a new dock or the rebuilding of an old dock is desirable and feasible, it shall be constructed or rebuilt of such type and capacity as the parties may agree to be the most economical.

The Milwaukee will pay to the North Western for the use of its docks in the following amount:—(1) for the use of present dock No. 6 until abandoned, Thirty and two-tenths per cent (30.2%) of $32,400.00 per annum; (2) Thirty and two-tenths per cent (30.2%) of the interest hereafter paid by the North Western on all future capital expenditures incurred in the construction of any new dock or docks or any extensions, additions or betterments to existing docks used by the parties under this agreement.

The Milwaukee will also pay the North Western Thirty and two-tenths per cent (30.2%) of all expenditures hereafter made by the North Western for taxes, maintenance, insurance premiums, watchmen service and fire protection on account of any of the present or future docks or any extensions thereof.

[fol. 54] The Milwaukee will reimburse the North Western to the extent of Thirty and two tenths per cent (30.2%) of any investment hereafter made by the North Western in docks, dock property and appurtenances hereafter used in handling the pooled ore. Such reimbursement shall be made in equal monthly payments sufficient to amortize the investment within the period of the estimated life of the structure. The Milwaukee shall also pay to the North Western Thirty and two-tenths per cent (30.2%) of any cost incurred in the demolition of any docks used under this contract and receive credit for the same proportion of the value of all salvage recovered.

The Thirty and two-tenths per cent (30.2%) is the relation the Milwaukee's share of the pooled ore bears to the total ore, including non-pooled ore from the Marquette Range handled through the docks at Escanaba. In case of a future change in relationship of the pooled to the non-pooled ore, the percentage employed will be revised.

The North Western will furnish the necessary supervision, labor, material and supplies for handling of ore over the docks and perform all operations incident thereto, and the Milwaukee will bear such proportion of the cost thereof as its share of the pooled tonnage is to the total tonnage handled through the docks.

[fol. 55] Operation and Use of Ore Dock Yard at Escanaba and Switching at Escanaba

Only pooled ore traffic will be handled through the so-called ore dock yard of the North Western at Escanaba and the North Western will handle the Milwaukee's proportion of pooled ore through said yard. The Milwaukee will bear its pool percentage of the maintenance expenditures recognized as being due to use incurred on all existing facilities in said ore dock yard. Wages of yard employees and other yard expenses will also be borne by the parties on the basis of pool percentages. Switching of pooled ore business at Escanaba shall be pooled and the North Western shall furnish crews for and shall perform all such switching throughout each ore shipping season. The total expense of such switching shall be divided between the parties on the basis of the pool percentages with proper allowance for the handling of non-pooled business.

Pooled Tracks and Facilities on the Range and Switching on the Range

All facilities on the Range necessary for the handling of pooled business shall be pooled and all facilities not necessary for the economical handling of pooled business shall be removed upon obtaining such authority, if any, as may be required. The pooling arrangement shall be accomplished without actual transfer of title to the trackage or facilities so pooled. Either party may retain for its ex- [fol. 56] clusive use any existing tracks which it desires to retain and may likewise build new tracks connecting with the pooled trackage.

The expense of maintaining pooled tracks and other pooled facilities on the Range shall be borne in accordance with the pool percentages and the expense of maintaining exclusive tracks and facilities shall be borne by the owner. The total cost of pooled maintenance shall be credited with an allowance for the movement of non-pooled cars. The work of maintaining the pooled tracks of the Milwaukee at Amasa and Iron Mountain shall be performed by the Milwaukee and the work of maintaining pooled tracks elsewhere on the Range shall be performed by the North Western.

The switching of pooled ore business at Amasa and elsewhere on the Range shall be pooled. The Milwaukee shall furnish power and crews for and shall perform all such switching throughout each ore shipping season at the mines at Amasa and the North Western shall furnish crews and shall perform all such switching throughout each ore shipping season for the service of mines elsewhere on the Range. The total expense of all such switching shall be divided between the parties on the basis of pool percentages with proper allowance for the handling of non-pooled business.

Road Haul.

The Milwaukee shall furnish train and engine men and [fol. 57] perform the road haul of ore and North Western non-pooled business between the Amasa district and Iron Mountain and Crystal Falls. The North Western shall furnish train and engine men and perform the road haul of ore and Milwaukee non-pooled business between the

remainder of the Range points and Escanaba, including Amasa ore, from Iron Mountain.

Maintenance expenses on tracks handling pooled traffic exclusively shall be borne on the pool percentages; on tracks handling both pooled traffic and non-pooled traffic, the portion assigned to pooled traffic shall be borne on the pool percentages and the portion assigned to non-pooled traffic shall be borne on the basis of each company's non-pooled traffic; on tracks for the exclusive non-pooled traffic of the operating company, the entire maintenance shall be borne by the operating company.

Expenses incurred exclusively in the performance of road haul of pooled traffic shall be borne by the parties on the basis of pool percentages with proper allowance for non-pooled traffic.

Motive Power and Cabooses for Handling Pooled Traffic and Pooling of Ore Cars

The North Western and the Milwaukee shall each furnish its pool percentage of suitable motive power and cabooses required to handle the pooled traffic throughout each ore season. Each party shall bear the cost of maintaining the [fol. 58] motive power and cabooses it supplies, and if at the end of any season it shall develop that either party supplied an excess of power and cabooses, such party shall be entitled to a fair rental for such excess. All cars for the handling of pooled ore shall likewise be pooled and the North Western and Milwaukee shall each furnish its pool percentage of car capacity required to handle the tonnage throughout each ore season. Each company shall maintain its own cars, at its own expense, except that the party in possession of pooled cars will provide inspection and furnish supervision and labor required in making minor repairs, the expense of which shall be divided on pool percentages.

Rental Based on Savings from Abandoned Operations

Each party will be able as a result of the pooling arrangement to discontinue certain operations and make certain savings thereby. The contract provides for an equitable division of these savings between the two companies. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all

of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad Company if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is therefore proposed that the future revenues from this traffic be pooled, and the earnings therefrom be divided between the parties on percentages determined by past experience.

[fol. 59] General Supervision

The operations of the parties on the Range in the vicinity of Amasa and in the transportation of ore mined at Amasa to Iron Mountain shall be under the supervision of the Superintendent of the Milwaukee. All other operations of the parties on the Range, in the ore yards and on the docks at Escanaba and in the transportation of pooled ore between the Range and Escanaba shall be under the supervision of the Superintendent of the North Western. The agreement shall continue in effect for ninety-nine years with provision that the Milwaukee shall have the right, upon permanent withdrawal from the ore business on the Menominee Range, to terminate the agreement by giving one year's written notice to the North Western.

IV

By pooling and jointly handling the properties, equipment and service in the manner aforesaid, the ore traffic moving from the Menominee Range to Escanaba will be handled more economically and more expeditiously and at the same time the Milwaukee and North Western will participate therein to the same extent as heretofore. The joint service on the Range will tend to provide more expeditious service in the distribution of empty ore cars and also in the assembling of loaded cars for line haul movements. An adequate supply of cars will be more fully assured at all times. The centralizing of all operations [fol. 60] over the docks of the North Western at Escanaba will expedite the unloading of ore from cars at the docks and the loading of boats from the docks. Joint operation both at Escanaba and on the Range will make the service to shippers as a whole more flexible and more adequate to meet the peak demands. The entire arrangement provided for in the agreement aforesaid will be in the interest

of better service to the public and will at the same time provide greater economy in operation. Furthermore, it will not unduly restrain competition.

V

Correspondence in regard to this application may be addressed to Nye F. Morehouse, Assistant General Solicitor, Chicago and North Western Railway Company, Room 1422, 400 West Madison Street, Chicago, Illinois, and to M. L. Bluhm, General Attorney, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, Chicago, Illinois.

Wherefore, applicants respectfully request that this application be set for hearing at an early date, and that after hearing, an order be entered by the Commission authorizing the North Western and the Milwaukee to pool ore traffic and divide the earnings therefrom between the Menominee Range and docks at Escanaba, Michigan, substantially as provided for in an agreement between the [fols. 61-63] parties, which is hereto attached and marked "Exhibit A" and which sets forth substantially the agreement between the parties relative to the pooling operations set forth in this application. An executed copy of this agreement in final form will be offered and introduced in evidence at the hearing of this case.

Dated at Chicago, Illinois, this 8th day of March, A. D. 1935.

Chicago and North Western Railway Company, by Fred W. Sargent, President. Escanaba, Iron Mountain and Western Railroad Company, by Fred W. Sargent, President. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by W. W. K. Sparrow, Vice President.

Duly sworn to by Fred W. Sargent et al. Jurats omitted in printing.

[fol. 64] EXHIBIT "A" TO APPLICATION

Chicago and North Western Railway Company

Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Proposed Agreement for Pooling of Ore Traffic

Menominee Iron Range

Revised February 28, 1935

[fol. 65] This Agreement, made and entered into this — day of 1935, by and between the Chicago and North Western Railway Company and the Escanaba, Iron Mountain and Western Railroad Company (hereinafter collectively or severally called "North Western"), and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter called "Milwaukee");

Witnesseth:

Whereas, the North Western owns and operates lines of railroad which extend through and serve territory known as the Menominee Iron Range located partly in Michigan and partly in Wisconsin, in the vicinity of Iron Mountain, Iron River and Crystal Falls, Michigan, and said lines of railroad extend from the Menominee Iron Range to ore docks of the North Western located in the harbor at Escanaba, Michigan, and the Escanaba, Iron Mountain and Western, a wholly owned and controlled subsidiary of the Chicago and North Western Railway Company, owns a line of railroad which extends from Iron Mountain to the said docks of the North Western at Escanaba, which line is leased to and operated by the Chicago and North Western; the Milwaukee owns and operates lines of railroad which also extend through and serve the territory known as the Menominee Iron Range and operates under trackage rights over the line of the Escanaba & Lake Superior Railroad, from a connection at Channing, Michigan, to ore docks of the Milwaukee also located in the harbor at Escanaba, Michigan, near the docks of the North Western. Both the North Western and Milwaukee own numerous spur, industrial and side tracks, some jointly and some separately, appurtenant to

their respective lines of railroad in the territory of the [fol. 66] Menominee Iron Range and used for the purpose of reaching and serving numerous iron mines in that territory and for the purpose of switching cars in the handling of ore traffic to and from the mines in said territory. The North Western and the Milwaukee each have yard facilities for the switching of cars handling such ore traffic at Escanaba, Michigan, adjacent to their respective docks. Heretofore each of the parties has separately handled its ore traffic from the Menominee Iron Range to its docks at Escanaba, using exclusively its own motive power and equipment. The ore traffic in question is loaded on lake boats from the respective docks of these two companies and is moved thence via the Great Lakes to destination ports; and

Whereas, the parties have determined that by pooling the entire tonnage and revenue of the iron ore traffic and hauling same from said Menominee Iron Range over the lines of the North Western to and through the docks of the North Western at Escanaba and providing for certain joint services, joint use of motive power, cars and other equipment, and joint maintenance and operation of tracks and other facilities used in handling said traffic, they will be able to improve their service to the public and at the same time reduce expenses, and the Milwaukee will be able to avoid making large capital expenditures for new docks This they now propose to do if and when consent of the Interstate Commerce Commission be obtained.

Now, Therefore, in consideration of the premises and their mutually dependent covenants hereinafter set forth, the parties hereto agree as follows:

[fol. 67] Definition of Range and Future Ore Developments Outside the Range Herein Defined:

1. The term "Range" as used in this agreement means that territory on the Menominee Iron Range along the North Western from Loretto and Vulcan on the east to Crystal Falls and Iron River on the west, and along the Milwaukee from Amasa on the north to Iron Mountain on the south and to Iron River on the west. Trackage and facilities on the Range and limits of the Range herein referred to are shown on the blueprint map hereto attached, marked "Exhibit A". Map Exhibit "A" shall be supplemented, once each five years to show changes in track layouts.

2. When and if mining operations in the future are opened up on the Menominee Iron Range and ore is produced therefrom outside the limits of the "Range" as herein defined, the parties shall then determine and adopt suitable arrangements supplemental to those herein provided to include such additional lines of railroad and facilities as may be required in the handling of such new tonnage and shall make such other changes or revisions in the arrangement as shall be appropriate.

Division of Tonnage and Revenue:

3. Ore mined or hoisted on the Range and transported from the Range to the docks at Escanaba shall be pooled, and tonnage and revenue collected thereon divided as follows:

North Western ..... 66 per cent,
Milwaukee ..... 34 per cent,

hereinafter referred to as the "Pool Percentages".

4. All storage, demurrage, dock and other charges, if any, collected on pooled ore shall also be divided between the North Western and the Milwaukee on the Pool Percentages.

[fol. 68] 5. Revenues on non-pool traffic, handled one for the other, as hereinafter defined, shall accrue and belong to the parties producing such traffic. Per-diem or mileage on cars used for such traffic; damage and repairs to the cars; and loss and damage to the contents thereof shall be handled as if the movements were entirely on or over the lines and tracks of the party producing such traffic.

Road Haul Between Range and Escanaba:

6. The Milwaukee shall handle with its road trains and crews during each year pooled ore mined in the vicinity of Amasa, over its line from Amasa to Iron Mountain, and deliver same to the North Western at Iron Mountain. The North Western shall handle with its road trains and crews during each year pooled ore mined elsewhere on the Range from points of production, together with the ore received from the Milwaukee at Iron Mountain, over its lines to the docks at Escanaba. The cost of road haul shall be borne as hereinafter provided.

Supervisory Organization and Procedure:

7. The operations of the parties on the Range in the vicinity of Amasa and in the transportation of ore mined at Amasa to Iron Mountain shall be under the supervision of the Superintendent of the Milwaukee. All other operations of the parties on the Range, in the ore yards and on the docks at Escanaba and in the transportation of the pooled ore between the Range and Escanaba shall be under the supervision of the Superintendent of the North Western. Superintendents shall cooperate in the handling of pooled traffic between Amasa and Iron Mountain. They shall make such reports to both parties as their General Officers may deem necessary.

[fol. 69] 8. Any special forces required by reason of these pool arrangements and not needed to any extent by either party to handle its ore separately shall be provided at the joint and equal expense of both parties.

Ownership, Maintenance and Use of Docks at Escanaba:

9. The docks to be used under this agreement shall be the docks of the North Western, owned by the Chicago and North Western Railway Company or its subsidiary, the Escanaba, Iron Mountain and Western Railroad Company. The North Western and the Milwaukee each accepts as its primary obligation the duty of furnishing docks and appurtenant facilities for handling its proportion of the pooled ore, but each recognizes that it is not practicable to divide actual ownership of the same in such proportions. The following arrangement, which is intended to distribute the burdens of ownership in said proportions and establish the principles of such distribution, is therefore agreed upon.

10. Beginning with the ore season of 1935, the Milwaukee shall discontinue the use of and abandon its docks at Escanaba. The North Western shall continue the use of its present docks—the dock known as No. 6 as long as it shall remain suitable for handling ore, estimated to be approximately fifteen years, and the dock known as No. 5 during the year 1935, and thereafter as long as the parties agree that it is more economical to do so than to construct a new dock or that the construction of a new dock is not feasible or justifiable by reason of financial conditions. Whenever

the parties agree that the construction of a new dock or the rebuilding of an old dock is desirable and feasible, it shall be constructed or rebuilt of such type and capacity as the parties may agree to be the most economical.

[fol. 70] The North Western shall have charge of the design and construction of said dock but plans thereof shall be developed in collaboration with the engineers of the Milwaukee and, in general, subject to their approval. Unless otherwise agreed to, competitive bids shall be taken, and after consideration of the bids received a decision reached as to whether the work shall be done by contract or by the North Western. With respect to materials used in such work shipped from points not reached by the lines of the North Western, such materials shall—all other things being equal—be purchased at points reached by the Milwaukee and shipped over its rails to such points of connection on the North Western as the latter road may specify.

11. Commencing with the ore season of 1935, the North Western agrees to handle the Milwaukee's proportion of the pooled tonnage through its present docks Nos. 5 and 6 and thereafter through said docks, any extensions thereof, or any new dock or docks that may hereafter be built in accordance with the provisions hereof, provided, however, that the North Western shall not be liable for damages in case of any emergency whereunder it may be unable to handle the total volume of ore of both parties, such as might arise from an unanticipated increase in ore production, unexpected disability to its docks or as the consequence of a strike or other similar occurrence, for failure to handle more than the Milwaukee's pro rata proportion, based upon the Pool percentage, of the total volume of ore that can be handled through the dock during such emergency, provided, however, that in no event shall less than 88.9% (the relation of the Menominee Range ore to the total ore handled over the docks at Escanaba in the period 1923-1932 inclusive) of the available capacity of the dock be utilized for pooled ore.

[fol. 71] 12. Commencing with the year 1935, the Milwaukee shall pay to the North Western for the use of its docks aforesaid the following amounts:

(1) For the use of present Dock No. 6, until abandoned, 30.2% of $32,400 per annum.

(a) 30.2% of the interest hereafter paid by the North Western on all future capital expenditures incurred in the construction of any new dock or docks used by the parties under this agreement or of any extensions, additions or betterments to existing docks used by the parties under this agreement.

The 30.2 per cent will apply, until it is later modified in accordance with the provisions of paragraph 20, which is the relation the Milwaukee's share of the pooled ore bears to the total ore, including ore from the Marquette Range, handled through the docks at Escanaba.

13. It is understood and agreed that it is the intent of the parties to share all interest and carrying charges incurred on all investments hereafter made in docks used in the handling of the pooled ore in the proportions of the tonnage of the parties and that the purpose of item (2) in paragraph 12 is to make provisions therefor so far as interest is involved and that the aggregate of all principal sums on which interest is to be paid under item (2) in paragraph 12 shall be equal to the total amount of the North Western's investment in docks made from and after the date of this agreement and in accordance with the accounting rules of the Interstate Commerce Commission, excluding interest during construction.

14. Interest on funds used by the North Western that are borrowed expressly for the purpose of constructing any of such docks, or additions thereto, shall be the actual interest paid on such loans. Interest on funds that are supplied [fol. 72] otherwise shall be at the actual net rate, including any premium, discount or underwriting charges, paid by the North Western on money borrowed for general purposes on its last loan prior to the time when such funds are used, provided, however, that if such last loan was at such a remote period that the rate of interest shall be out of line with going rates, then the going rate for similar loans shall be determined and used.

15. Payments of the sums under item (1) above shall be due in equal amounts semi-annually, on January first and July first of each year. Payments under item (2) shall be due ten days prior to the dates upon which the North Western is required to make its interest payments on the loans from which the funds shall have been derived.

16. The Milwaukee shall also pay 30.2 per cent of all expenditures hereafter made by the North Western for taxes, maintenance, insurance premiums, watchmen service and fire protection on account of any of the present or future docks or any extensions thereof. Such payments to be due and payable as of the date upon which the North Western incurs such expenditures, or as soon thereafter as bills are rendered by the North Western. It is agreed that as to such bills the North Western shall have the right to call upon the Milwaukee for its proportion of any such expenditure in order that it may apply the payment upon the expenditure, or incur the expenditure in full and thereafter call upon the Milwaukee for reimbursement, as the North Western may elect.

17. It is agreed that the Milwaukee shall reimburse the North Western to the extent of 30.2 per cent of any investment hereafter made by the North Western in docks, dock property and appurtenances hereafter used in handling the pooled ore. Such reimbursement shall be made in equal [fol. 73] monthly payments of amounts which, together with interest at such rate or rates as are established for the purposes of item (2), paragraph 12, compounded annually, will be sufficient in the aggregate to amortize the investment within the period of the estimated life of the structure. If any structure lasts longer and continues to be used beyond the estimated life upon which the sinking funds for amortization of investment were calculated, no further payments shall be made after the investment therein has been fully amortized, either for the purpose of this paragraph or for interest on such investment as provided in item 2, paragraph 12. If any structure does not last as long as its estimated life, or ceases to be used before its estimated life has expired, the residue not covered by the amortization payments herein provided for shall be paid in full when the investment therein is retired. The cessation of ore traffic or the termination of this agreement shall be deemed to amount to retirement of investment, provided that if the North Western shall retain for its use more than its tonnage proportion of docks on which amortization charges have been divided, then the Milwaukee's payment toward the residue not covered by amortization shall be limited to the portion of the docks which could be abandoned. The accrual of depreciation in the accounts of the North Western

shall not be deemed a retirement of investment within the meaning of this paragraph. Payments herein provided for, for amortization of investment shall begin immediately upon completion of the work upon which the expenditure was incurred. Investment for the purposes of this paragraph shall be the same in amount as for the purposes of item (2), paragraph 12, and as defined in paragraph 13.

[fol. 74] 18. The Milwaukee shall pay to the North Western said 30.2% of any cost incurred in the demolition of any docks used under this contract and receive credit for the same proportion of the value of all salvage recovered. For portions of foundations reused no credit shall be allowed for the salvage value nor shall the appraised value for use in new construction thereon be treated as investment for the purposes of this contract.

19. As to taxes, it is agreed that the obligation of the Milwaukee shall be its proportion as aforesaid of such taxes as are levied and paid on account of the property or the use of the property involved, and that unless the property is separately assessed and taxes separately collected, a fair and equitable proportion of all taxes paid by the North Western on its property in Michigan as a whole, and in which said docks are included, shall be paid by the Milwaukee.

20. It is agreed and understood that if in the future a change of a permanent nature in the relationship of the pooled to the non-pooled tonnage handled over the dock arises from an increase or decrease in the volume of such non-pooled tonnage which would result in an inequitable division of the expenses in accordance with the intent of this contract, the percentage employed for the distribution of expense (30.2%) in paragraphs 12, 16 and 17 shall be revised.

Dock Operation at Escanaba:

21. The North Western shall furnish the necessary supervision, labor, material and supplies for handling all ore over the docks and perform all operations incident thereto, including the steaming of ore. The Milwaukee shall bear such proportion of the cost thereof as its share of the pooled tonnage is of the total tonnage handled through [fol. 75] the docks. Billing for such costs shall be made

monthly, with such adjustment as may be necessary at the end of each year to divide the costs on the basis of the yearly tonnage. All operating expenses of whatever nature shall be included in the foregoing, except maintenance, insurance premiums, watchmen service, and fire protection, which are provided for elsewhere.

Operation and Use of Ore Dock Yard at Escanaba:

22. It is contemplated that pooled ore traffic only will be handled through the so-called ore dock yard of the North Western at Escanaba, and the North Western agrees to handle the Milwaukee's portion of pooled ore through said yard. No specific rental other than a share of the savings provided for elsewhere in this agreement shall be paid by the Milwaukee for the use of existing facilities in said yard. It is agreed that the existing facilities have a capacity for the normal and efficient handling of three and one-half million tons per annum and that whenever the volume of ore to be handled through this yard in any year shall exceed this amount additional trackage will be required. When it is needed, the North Western shall construct such additional trackage and thereafter the Milwaukee shall pay the North Western two per cent per annum on the capital expenditures made therefor and shall bear its Pool Percentage (34%) of all maintenance expenditures thereafter incurred thereon. The Milwaukee shall bear its Pool Percentage of the maintenance expenditures recognized as being due to use incurred on all existing facilities in the said ore dock yard from and after the effective date of this agreement. In the determination of the amount of maintenance due to use, the A. R. E. A. Formula for this purpose shall be employed.

[fol. 76] 23. The foregoing basis for assigning rental and division of maintenance shall be followed so long as the ore dock yard is used exclusively, or substantially so, for the handling of pooled ore. If in the future traffic other than pooled ore should be handled through said yard to any substantial extent, suitable allowances shall be made therefor.

24. Wages of yard employees and other yard expenses, the principal accounts being 377-Yardmasters and Yard Clerks; 379-Yard Switch and Signal Tenders; and 389-

Yard Supplies and Expenses, shall be pooled and borne by the parties on the basis of the Pool Percentages.

Switching at Escanaba:

25. The switching of pooled ore business at Escanaba shall be pooled. The North Western shall furnish crews for and shall perform all such switching throughout each ore shipping season. The total expenses of such switching the principal accounts being 378-Yard Conductors and Brakemen; 380-Yard Enginemen; 382-Fuel for Yard Locomotives; 385-Water for Yard Locomotives; 386-Lubricants for Yard Locomotives; 387-Other Supplies for Yard Locomotives; and 388-Enginehouse Expenses-Yard shall be divided between the parties on the basis of the Pool Percentages. Whenever crews assigned to the handling of pooled ore are used for non-pooled business, a proper deduction shall be made for the engine hours devoted to non-pooled traffic. The party for whom such non-pooled traffic switching is performed shall bear the total cost thereof. If non-pooled traffic is handled in conjunction with pooled traffic, so that a deduction of actual engine hour time cannot be made, a time allowance per car shall be agreed upon and deductions calculated accordingly. Whenever Milwaukee non-pooled traffic is handled in conjunction with North Western [fol. 77] non-pooled traffic, and not in connection with pooled ore, the cost of such work shall be determined as nearly as possible on an actual basis and billed against the Milwaukee. The Milwaukee shall bear its Pool Percentage of the Maintenance due to use of facilities, such as engine houses, turn-tables, water and coal stations, tracks, etc., used in servicing locomotives and assignable to the pooled ore traffic. Maintenance due to use shall be determined by the A. R. E. A. Formula, and the proportion of maintenance assignable to the pooled ore traffic shall be determined from time to time from the number of units serviced.

Pooled Tracks and Facilities on the Range:

26. A joint survey shall be made as soon as practicable to determine what trackage (exclusive of main line tracks) and facilities incident thereto, on the Range are necessary for the handling of pooled business, including mine service tracks, switching and yard tracks, engine terminals, repair

tracks, assembly yards, and any other tracks and facilities necessary for the economical operation of the pooled service. The facilities so determined as necessary for the pooled business shall be pooled. All trackage not necessary for the economical operation of the pooled service shall be removed both that exclusively owned and that jointly owned, governmental authority for such removal being obtained if and when required. Salvage therefrom and expense of removing shall be distributed according to ownership. Either party may retain for its exclusive use any existing tracks which it desires to retain and use for non-pooled traffic, and in the case of a jointly owned track it will settle with the other road on the basis of the salvage value of the material.

[fol. 78] 27. There shall be no actual transfer by either party to the other of title to the trackage or facilities so pooled, but for the purpose of handling the pooled traffic it is mutually conceded that the pooling of the same as herein provided grants to the respective parties equal rights and privileges of use, to the same extent as if joint ownership were actually effectuated by transfer of title. The use by either party of the pooled trackage and facilities, including the main line of the Milwaukee between Amasa and Crystal Falls, shall also be permitted in the handling of non-pooled traffic to and from territory nor reached and served by tracks and facilities which either party shall have abandoned pursuant to this agreement. Either party shall have the right to build spur tracks from pooled tracks within the territory now reached and served by the tracks and facilities which they shall have abandoned pursuant to this agreement, for serving industries other than ore mines; the other party being privileged to join in such construction, or thereafter to have the right, within a period of five years, to acquire one-half ownership therein upon payment of one-half of the cost thereof. Except to the extent herein otherwise provided, neither party shall have the right to have trackage retained in the pool which is not needed for the economical handling of the pooled traffic, either at the present or any future time.

Maintenance of Range Tracks and Facilities:

28. The expense of maintaining pooled tracks and other pooled facilities on the Range shall be borne by the North

Western and the Milwaukee in accordance with the Pool Percentages. The expense of maintaining exclusive tracks and facilities shall be borne by the owner.

29. The total cost of pooled maintenance shall be credited with an allowance for the movement of non-pooled cars over the pooled tracks based upon the percentage of [fol. 79] non-pooled cars to total cars. Zones shall be established by agreement between the parties so as to fairly distribute such expense. This allowance, which shall be chargeable against non-pooled cars, shall be apportioned between the North Western and the Milwaukee in accordance with the percentage of non-pooled cars handled by or for each of them respectively, and be made in the form of an annual adjustment.

30. The work of maintaining the pooled tracks of the Milwaukee at Amasa and Iron Mountain shall be performed by the Milwaukee. The work of maintaining pooled tracks elsewhere on the Range shall be performed by the North Western.

Additions, Betterments and Retirements of the Range, and Property Adjustment Upon Termination of Contract:

31. The North Western and the Milwaukee shall each, after obtaining approval of the other, make such additions and betterments, extensions, rearrangements and retirements to the pooled tracks and facilities on the Range which it maintains as may by mutual agreement be found essential for the efficient and economical handling of the pooled business. The party making such additions and betterments shall be reimbursed by the other to the extent of such other party's Pool Percentage of the actual cost thereof. For simplicity in accounting and recording it is proposed that minor track extensions incident to rearrangement or adjustment of yard tracks within existing mine yards shall be owned on the basis of the tracks to which the extensions are made and the accounting, both installation and retirement, recorded through Account 701 of the Road in whose accounts the investment for the original facility is carried. All new tracks, and major extensions to existing tracks such as those serving new mines or new [fol. 80] industries and new facilities such as water tanks,

section houses, etc., shall be treated as jointly owned, and the pool percentage of construction cost recorded in the Investment Account of each Road.

32. Subsequent to the adjustment and removal of trackage pursuant to Section 26 hereof, any pooled tracks which are no longer required shall be removed by the maintaining party. The cost of removal and the salvage recovered therefrom shall be divided upon the pool percentages.

33. Upon termination of this agreement the pooled tracks and facilities shall be disposed of as follows:

(a) Tracks which either party desires to retain may be acquired by reimbursing the other for the pool proportion of the net salvage value or if both parties wish to retain, shall be continued in joint ownership.

(b) The net salvage from tracks which are abandoned shall be divided on the pool percentages.

Use and Maintenance of Tracks and Other Facilities Utilized in the Transportation of Pooled Traffic and Empty Cars and Equipment Therefor Between the Range and Escanaba, the North Western's Non-pooled Traffic and Equipment Therefor Between Amasa and Crystal Falls, and the Milwaukee's Non-pooled Traffic and Empty Equipment Therefor Between Escanaba and Iron Mountain:

34. The North Western agrees to handle the Milwaukee Company's portion of the pooled traffic and such non-pooled traffic (hereinafter defined) as the Milwaukee is now privileged to handle over the E. & L. S. R. R. and empty equipment therefor, over its main tracks, side tracks, other yards, and all other facilities required to be used in the transportation thereof, between the Range and appropriate originating and terminating facilities in or near Escanaba; without any specific rental therefor other than the share [fol. 81] of the savings herein otherwise provided. The non-pooled traffic referred to above is to consist of: (a) Coal, commercial and company, from any coal dock in the Township of Wells or in or near the City of Escanaba, which the Milwaukee now owns or leases or which it may hereafter own or lease, and which can be connected up with

North Western trackage by new tracks, trackage rights, or switching arrangements with other railroads; destined to any Milwaukee owned or operated trackage in or near Escanaba or the Township of Wells, or to any point on the Range now served by the Milwaukee, or to any point on or beyond Milwaukee lines; and (b), Company material for construction and maintenance of any facilities of the Milwaukee which may now or hereafter be located in the Township of Wells or in or near the City of Escanaba.

35. A joint survey shall be made as soon as practicable of the road trackage and facilities incidental thereto of each party needed and to be used for the movement of—

(a) Pooled ore,

(b) Pooled ore and non-pooled freight traffic,

(c) Pooled ore, non-pooled freight and passenger traffic,

(d) Exclusive non-pooled freight traffic and passenger traffic of the operating company.

The survey shall divide the section into zones so that as nearly as practicable the traffic characteristics shall be the same within the limits of each zone, and with the further objective that a division of maintenance based on a count of cars and locomotives will give the same result as a division based on car miles and locomotive miles. The maintenance expenses for each such class of trackage and facilities, by zones, exclusive of engine terminal facilities, fuel stations, water stations and equipment repair facilities [fol. 82] shall be segregated in the records of the maintaining parties and the proportions thereof attributable to use as determined in accordance with the A. R. E. A. Formula shall be further divided and paid for by the parties hereto as follows:

Class (a). No further division; Each party will pay or bear its Pool Percentage.

Class (b). To be divided between pooled and non-pooled freight traffic on the basis of number of cars thereof: The portion assigned to pooled traffic will be paid for or borne on the Pool Percentages; the portion assigned to non-pooled freight traffic will be paid for or borne on the basis of each parties non-pooled cars thereof.

Class (c). To be divided between pooled and non-pooled freight traffic and passenger train traffic on the basis of cars and locomotives thereof—passenger train cars and locomotives, to be multiplied by two account speed and low consist of passenger trains; The portion assigned to pooled and non-pooled freight service shall be further handled as provided for in class (b). The portion assigned to passenger train service shall be borne by the party operating such trains.

Class (d). To be borne in total by the operating party.

Where rail is relaid with heavier rail, for the purpose of this contract, the cost of the additional weight shall be handled as if chargeable to operating expenses.

The maintenance due to use of engine terminal facilities, [fol. 83] fuel stations, water stations and equipment repair facilities, for the purposes of apportionment of these expenses between the two companies, shall be handled as follows:

(a) Engine terminal facilities: Add proper proportion to and distribute in Enginehouse Expenses as if chargeable to Accounts 388 (Yard) and 400 (Road).

(b) Fuel Stations: Add to the charge-out price of coal as if chargeable to Accounts 382 (Yard) and 394 (Road).

(c) Water Stations: Add to the price of water as if chargeable to Accounts 385 (Yard) and 397 (Road).

(d) Equipment Repair Facilities: Add proper proportion to and distribute in locomotive and car repairs as if chargeable to Accounts 308 and 314.

36. The Milwaukee agrees to handle the North Western's portion of the pooled traffic from the Amasa District over its main tracks, yards, side tracks and all other facilities required to be used in the transportation of pooled traffic and empty equipment therefor between Amasa and Iron Mountain and the North Western's non-pooled traffic and empty equipment therefor to or from Amasa and Balsam and between said points Amasa or Balsam and Crystal Falls or Iron Mountain as agreed upon from time to time without any specific rental therefor other than the share of the savings herein elsewhere provided. The facilities used for the handling of pooled or non-pooled traffic and

the division of maintenance expenses attributable to use shall be determined and divided as between passenger, pooled freight and non-pooled freight, on the same basis as prescribed in paragraph 35.

[fol. 84] Switching on the Range:

37. The switching of the pooled ore business at Amasa and elsewhere on the Range shall be pooled. The Milwaukee shall furnish power and crews for and shall perform all such switching throughout each ore shipping season at the mines at Amasa. The North Western shall furnish crews for and shall perform all such switching throughout each ore shipping season for the service of mines elsewhere on the Range. The total expenses of all such switching the principal accounts being—378, Yard conductors and brakemen; 380, Yard Enginemen; 382, Fuel for yard locomotives; 385, Water for yard locomotives; 386, Lubricants for yard locomotives; 387, Other supplies for yard locomotives; 388, Enginehouse expenses-Yard shall be divided between the parties on the basis of Pool Percentages. Whenever crews assigned to the handling of pooled traffic are used for non-pooled traffic, a proper deduction shall be made for the engine hours devoted to non-pooled traffic. The party for whom such non-pooled traffic switching is performed shall bear the total cost thereof. If non-pooled traffic is handled in conjunction with pooled traffic, so that a deduction of actual engine hour time cannot be made, a time allowance per car shall be agreed upon and deductions calculated accordingly. Whenever the non-pooled traffic of one road is handled in conjunction with the non-pooled traffic of the other road, the cost of such work shall be determined as nearly as practicable on an actual basis and billed accordingly. Each party, as prescribed in Paragraph 35, shall bear its Pool Percentage of the maintenance of enginehouses, turn-tables, water and coal stations and other facilities used in servicing the switching locomotives.

[fol. 85] Road Haul:

38. The Milwaukee shall furnish train and engine men and perform the road haul of ore and North Western non-pooled business between the Amasa District and Iron Mountain and Crystal Falls. The North Western shall furnish train and engine men and perform the road haul of ore and

Milwaukee non-pool business between the remainder of the Range points and Escanaba, including Amasa ore from Iron Mountain.

39. Expenses incurred exclusively in the performance of road haul of pooled traffic shall be borne by the parties on the basis of Pool Percentages. Expenses the principal accounts being 392, Train Enginemen; 394, Fuel for train locomotives; 397, Water for train locomotives; 398, Lubricant for train locomotives; 399, Other supplies for train locomotives; 400, Enginehouse expenses-Train; 401, Trainmen, and 402, Train supplies and expenses incurred in the performance of road haul of trains handling pooled traffic of either company, pooled and non-pooled traffic of either company, or non-pooled traffic of both companies, shall be divided on the basis of the car miles of pooled and non-pooled traffic in such trains. The pooled proportion shall be divided between the parties on the basis of the Pool Percentages. The non-pooled proportions shall be divided between the parties on the basis of the percentage the car miles of each is of the total car miles of non-pooled traffic. Transportation expenses that are not directly associated with train service, the principal accounts being 371 Superintendence, 372 Dispatching Trains, 404 Signal and Interlocker Operation, 405 Crossing Protection, 406 Drawbridge Operation, 407 Telegraph and Telephone Operation, 410 Stationery and Printing, 411 Other Expenses, 415 Clearing Wrecks, 416 Damage to Property, 417 Damage to Livestock on right-of-way, 420 Injuries to Persons, shall be divided [fol. 86] between the pooled and non-pooled traffic on the basis of train miles of pooled and non-pooled traffic, including passenger service, in the entire pool territory. Where trains carry pooled and non-pooled cars the train miles shall be divided between pooled and non-pooled traffic on the basis of the car miles of each. The pooled proportion shall be borne by the parties on the basis of the Pool Percentages. The non-pooled proportion shall be borne by the parties on the basis of the percentage the freight car miles of each is of the total car miles of non-pooled freight traffic in the entire pool territory.

Motive Power and Cabooses for Handling Pooled Traffic:

40. The North Western and the Milwaukee shall each furnish and have the right to furnish its Pool Percentage of suitable motive power and cabooses required to handle the pooled tonnage throughout each ore season. The motive power requirement for switching shall be measured in terms of engine hours of comparable tractive power worked. The motive power requirement for road haul service shall be measured in terms of locomotive ton miles. It shall be the duty of the North Western to use Milwaukee equipment furnished to the pool as intensively as its own equipment.

41. Each party shall bear the cost of maintaining the motive power and cabooses it supplies, except that if at the end of any ore season either party shall have supplied more than its Pool Percentage it shall be entitled to be reimbursed for the maintenance thereof to the extent that its contribution exceeds its Pool Percentage of the total required. The party supplying the excess power and cabooses shall be entitled to a fair rental for such extra contribution to cover interest on investment, depreciation and maintenance, provided, however, that deficiencies arising [fol. 87] through inability to anticipate the quotas of each party in advance, or deficiencies arising out of failure of the North Western as the operating company to notify the Milwaukee of any part of its quota requirement, may be made up in the following year. In the performance of maintenance work, all classified repairs shall be made by the party owning the power. Necessary running repairs shall be made by the North Western on all power and cabooses except that employed in handling the ore from the Amasa District to Iron Mountain. The cost thereof shall be borne by the owner.

42. In determining the motive power requirement performed by locomotives of either party in road haul service used in the movement of pooled traffic in trains also handling other traffic of the owner, the locomotive ton miles made while the locomotive was handling pooled traffic shall be such proportion of the total locomotive ton miles as the gross ton miles made by ore cars, empty or loaded with ore, and the gross ton miles made by cars moving non-pooled traffic of the other party bears to the total gross ton miles

made by all cars handled by such locomotives during such period.

Counting Cars For Computing Car Miles For Distribution of Expense:

43. In counting cars, no distinction shall be made between the various kinds of cars, loaded or empty, except that passenger cars and passenger locomotives shall be counted as two cars each. Locomotives other than passenger locomotives shall not be counted. All empty ore car movements between points on the Range or between Escanaba and points on the Range shall be attributable to pooled traffic. All empty car movements over the tracks of the North Western known to be for handling Milwaukee's [fol. 88] non-pooled traffic shall be attributable to its non-pooled traffic. All other empty car movements over the tracks of the North Western shall be attributed to the North Western's non-pooled traffic. All empty car movements over the tracks of the Milwaukee known to be for North Western's non-pooled traffic shall be attributable to its non-pooled traffic. All other empty car movements over the tracks of the Milwaukee shall be attributable to the Milwaukee's non-pooled traffic. Movements of work cars or other non-revenue equipment over the lines of either of the parties shall not be counted. Company material for use outside of the pool district of the owning company shall be considered as non-pooled traffic and the cars counted in the same manner as elsewhere provided for revenue non-pooled traffic.

Pooling of Ore Cars:

44. All cars for the handling of pooled ore shall be pooled when so required. The North Western and the Milwaukee shall each furnish and have the right to furnish its Pool Percentage of the car capacity required to handle such tonnage throughout such ore season. If either of them shall be unable to furnish its proportion of the necessary ore cars it may lease from the other, if cars are available, at A. R. A. rates, sufficient number of such cars to make up the deficiency.

45. To the extent found necessary, pooled cars shall be marked as such and handled accordingly. When cars are taken out of pooled service for general repairs or other

service, they shall be forthwith replaced by cars of equal capacity similarly identified. Pooled cars shall not be moved outside of the pooled territory without substitution of equivalent capacity. Pooled ore cars will be used by either party in other service only to the extent that such [fol. 89] use will not interfere with the pooled service. Whenever such use does interfere, the party using such cars in other service shall forthwith provide an equivalent capacity of additional cars for the pooled service.

Maintenance of Pooled Cars:

46. The North Western and the Milwaukee shall each maintain its own cars at its own expense, except as herein otherwise provided. Cars leased by one party to the other shall be maintained by the lessee company to the extent provided by A. R. A. rules.

47. The party in possession of pooled cars will provide inspection and furnish supervision and labor required in making minor repairs, generally referred to as "Transportation Yard Repairs" and "Lubricating Cars", and like service. The expense of such inspection, supervision and labor shall be divided on Pool Percentages. An equitable proportion of the cost of supplies and tools used by such forces shall be assigned to the expense of pooled cars and borne by the parties on the basis of the Pool Percentages.

48. The cost of materials used in making Transportation Yard Repairs shall be borne by the car owner or lessee.

49. The total cost of other running repairs, including both labor and materials, shall be borne by the car owner whether made by the owner or not.

50. The cost of repairs to pooled cars damaged as a result of non-pooled operations shall be borne by the party responsible for such damage.

[fol. 90] Rental Based on Savings from Abandoned Operations:

51. The Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad and shall discontinue and abandon its yards and other facilities at Escanaba, except its coal dock and tracks appurtenant thereto. The North Western shall

subject to the approval of the I. C. C. discontinue and abandon its Amasa line. It is agreed that during the ten years ending with 1932 these roads incurred average annual expenditures as follows which will hereafter be saved.

Milwaukee:

I. Operations over the Escanaba & Lake Superior R. R.:

	Fixed Independent of Volume of Ore	Varying With Volume of Ore
(a) Maintenance of way and structures not due to use determined in accordance with A. R. E. A. formula	$	$41,950.00
(b) General Expenses		4,682.00
(c) Taxes		15,019.00
(d) Rental		15,194.00
Total		76,845.00

II. Operating Escanaba Yard:

Maintenance of way and structures not due to use determined in accordance with A. R. E. A. formula	$2,625.00

[fol. 91] North Western:

III. Operating Amasa Line:

Maintenance of way and structures not due to use determined in accordance with A. R. E. A. formula	$2,681.00

NOTE.—Adjustment account salvage and taxes omitted in II and III as assumed to offset.

The Milwaukee shall pay annually to the North Western in equal monthly installments, one half of the fixed expenses under II, and the North Western shall similarly pay to the Milwaukee, one-half of the fixed expenses under III. The Milwaukee shall also pay to the North Western for each ton of its proportion of the pooled ore handled 2.762 cents per ton, which amount is one-half of the average annual expense

varying with the volume of tonnage of $76,845 divided by the average annual tonnage of the Milwaukee over the ten-year period of 1,391,443 tons. Under the provisions of the contract between the Milwaukee and Escanaba and Lake Superior Railroad the Milwaukee is required to pay a fixed minimum annual rental of $27,180, and, in addition, approximately $1,234 for amortization of past additions and betterments. Should the Milwaukee discontinue the use of the line of the E. & L. S., it is obligated under the provisions of the contract to continue these payments so long as the E. & L. S. maintains its line between Channing and Escanaba, or until the expiration of the contract between the two companies on January 1, 1951. From the date the Milwaukee is relieved of making these payments, it shall pay annually to the North Western one-half of the fixed minimum rental payment, or $13,590, during the life of the ore pooling contract, and one-half of the payment for amortization of past additions and betterments, or $617 until January 1, 1951.

[fol. 92] Traffic Interchanged with the Escanaba and Lake Superior Railroad:

52. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is, therefore, agreed that from the effective date of this contract the revenues of the two companies from all business interchanged with the E. & L. S. shall be pooled on the following basis:

A study of the six year period, 1927 to 1932, both inclusive, shall be made and the total revenue accruing to each company on business interchanged by the Milwaukee and the North Western with the Escanaba and Lake Superior Railroad determined. From the total amount interchanged by the Milwaukee with the Escanaba and Lake Superior Railroad shall be deducted an amount equal to ten per cent. The relation between the remainder and the total of such remainder plus the revenue of the North Western shall then be determined. Thereafter, the total revenues derived by each company from business interchanged with the Escanaba and Lake Superior Railroad, less an amount of thirty per

cent of such gross revenues to cover cost of handling by either company, shall be put into a pool and divided on the basis of the percentages established for the six year period.

53. Should the North Western subsequent to the date this contract is entered into acquire the trackage of the Escanaba and Lake Superior Railroad, it will continue to pay the Milwaukee a net figure equal to the Milwaukee's division during the period the contract has been in effect.

[fol. 93] 54. In case the North Western should acquire the terminals of the Escanaba and Lake Superior Railroad by other than voluntary action on its part at any future date, then the question as to how much the North Western should pay to the Milwaukee on account of divisions arising out of interchange business shall be determined by impartial arbitrators.

Presentation and Settlement of Bills:

55. Except as herein otherwise provided, bills shall be rendered monthly and payable within thirty days after presentation.

Collections for Pooled Operations:

56. Settlement for revenue shall be through the current monthly settlement of revenue collected for interline freight traffic.

Examination of Accounts:

57. Each party shall have the privilege of examining the books and accounts of the other involved in this arrangement, but payments of bills shall not be withheld pending such examination.

Existing Agreements Superseded:

58. Any provisions of existing agreements between the parties hereto covering ownership, maintenance, use or operation of any of the tracks, facilities or services hereunder pooled which are inconsistent with any of the provisions of this agreement shall be superseded by the provisions of this agreement from and after the effective date hereof, provided, however, that any of the rights, privileges or obligations of either of the parties accrued prior thereto shall not be affected.

[fol. 94] Annual Adjustments:

59. Any deficiency in tonnage, engine hours, or other pooled expense, remaining at the end of a season or year, shall be carried forward to the subsequent year's operations and adjusted as early as possible in such subsequent year.

Materials Used in Construction and Maintenance of Tracks and Facilities:

60. The North Western and the Milwaukee each reserves the right to (a) furnish all materials required for both maintenance of and addition and betterment work to its solely non-pooled tracks, and (b) furnish in so far as is practical its proportion, at Pool Percentages, of any and all materials, small tools and equipment required in connection with both maintenance of, and addition and betterment work to, pooled trackage and facilities. Materials furnished by each party shall be of equal grade and quality, and each shall be given credit in bills rendered for the purchase price of same, plus foreign line transportation charges.

60½. All track changes, including new tracks and connections, necessary at the outset for the ore pooling and the handling by one company for the other of its non-pool traffic, shall be built by the party most conveniently situated to perform the work and the cost shall be divided equally.

General Overhead and Other Indirect Expenses:

61. For all work of constructing new ore docks, or complete rebuilding of the superstructure, or section thereof, or for extending present docks, and for all additions and betterments work, cost shall be the expenditures recorded in the books of the constructing company (excluding interest during construction) in accordance with the classification of [fol. 95] Investment in Road and Equipment of Steam Roads prescribed by the Interstate Commerce Commission in effect at the time such expenditures are made, plus two and one-half per cent (2½%) of the total expenditures recorded except that to payments to contractors 1% only shall be added.

62. For heavy renewals of ore docks, generally performed between ore shipping seasons, the cost for the purpose of this agreement shall be determined in accordance with the classification of Investment in Road and Equipment of

Steam Roads prescribed by the Interstate Commerce Commission (excluding interest during construction) in the same manner that they would be determined if the expenditures were chargeable to Investment Account in accordance with the above mentioned classification. To the total expenditures so determined, two and one-half per cent (2½%) shall be added except that to contractors' bills 1% only shall be added.

63. With the exception of the expenditures provided for in paragraphs 61 and 62, the classifications of the Interstate Commerce Commission in effect at the time any expenditures are made shall be followed in determining whether such expenditures are a part of the cost of construction or making additions and betterments to said ore handling facilities, tracks, etc., and therefore chargeable to Capital Account, or whether such expenditures are a part of the cost of operating, maintaining, repairing and renewing said ore handling facilities, tracks, etc., and are chargeable to operating expense accounts.

64. With the exception of the expenditures provided for in paragraphs 61 and 62, it is understood and agreed that cost of operating, maintaining, repairing and renewing said ore handling facilities, tracks, etc., shall be the expendi- [fol. 96] tures recorded in the books of the maintaining and operating company, in accordance with the classification of Operating Revenues and Operating Expenses of Steam Roads prescribed by the Interstate Commerce Commission, together with a fair amount to cover rental and transportation of equipment. To the recorded expenditures for material and supplies except locomotive coal there shall be added fifteen per cent (15%) to cover store expense, accounting, and transportation on the maintaining and operating company's line.

65. The rental rates charged for steam wrecker or other similar equipment used in emergency in ore operation shall be those used in the accounts of the company furnishing same for similar equipment when used for Additions and Betterments work.

66. Contributions paid by either party under the provisions of the Railroad Retirement Act, or any similar legislative Act, shall be considered as a part of the cost of labor and distributed in the same manner as wages.

Term of Agreement:

67. This agreement shall be effective as soon as practicable following the date of approval by the Interstate Commerce Commission, and shall continue for a period of ninety-nine (99) years from the succeeding December 31st, provided, however, that the Milwaukee shall have the right, upon permanent withdrawal from the ore business on the Menominee Range, to terminate the agreement at the end of any calendar year by giving one year's written notice in advance to the North Western of such intention to withdraw.

[fol. 97] BEFORE INTERSTATE COMMERCE COMMISSION

No. 26903

[Title omitted]

MOTION OF TRUSTEES OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY TO JOIN IN APPLICATION—Filed February 18, 1936

Come now Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and move that they be permitted to join the Chicago, Milwaukee, St. Paul and Pacific Railroad Company as parties applicant herein, and for grounds thereof state:

1. That Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a party applicant in this proceeding.

[fol. 98] 2. That on June 29, 1935, petition was filed in the District Court of the United States, for the Northern District of Illinois, Eastern Division, being Cause No. 60463 in said Court, for the reorganization of Chicago, Milwaukee, St. Paul and Pacific Railway Company, under Section 77 of the Bankruptcy Act. By order of June 29, 1935, the Court found that said petition had been filed in good faith, and authorized and directed the Debtor, pending further order of the Court, to continue in possession and control of its properties. By order of October 17, 1935, the Court appointed Henry A. Scandrett, Walter J. Cummings

and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company. Copies of said orders are on file with the Commission in Finance Docket No. 10882. On December 28, 1935, the Commission ratified the appointment of said Trustees, and on January 1, 1936, the said Trustees, having filed bond in the amount fixed by the Court, assumed their duties.

3. That by the orders of the Court appointing them, the Trustees are empowered and directed, subject to the control of the Court, and the approval and authorization of the Interstate Commerce Commission with respect to matters within the jurisdiction of said Commission, to manage, operate and conduct the business of the Debtor (Chicago, Milwaukee, St. Paul and Pacific Railroad Company); to [fol. 99] run, manage, maintain and operate and keep in proper condition and repair, the railroad and properties of the Debtor, wherever situated; that the said Trustees believe that the granting of said application will be in the interest of and to the benefit of the property of the Debtor now in their possession and being operated by them.

Wherefore, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, pray that an order be entered, joining them with Chicago, Milwaukee, St. Paul and Pacific Railroad Company as parties applicant in this proceeding.

Dated at Chicago, Illinois, this 13th day of February, A. D., 1936.

Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by Henry A. Scandrett, One of Said Trustees. O. W. Dynes, C. R. Sutherland, 888 Union Station, Chicago, Illinois, Attorneys for Trustees.

[fol. 100] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 26903

[Title omitted]

MOTION TO SUBSTITUTE TRUSTEE AS APPLICANT—Received September 28, 1936

Comes now Charles P. Megan, Trustee of the property of Chicago and North Western Railway Company, and in support of this his motion states:

1. That on June 28, 1935, the District Court of the United States for the Northern District of Illinois, Eastern Division, in certain proceedings for the reorganization of a railroad entitled, "In the Matter of Chicago and North Western Railway Company, Debtor", No. 60448, entered Order No. 1, pursuant to which said Railway Company remained in possession of and operated its entire property until October 21, 1935, when movent took possession and began operation of the said property as trustee, pursuant to [fol. 101] Orders Nos. 24 and 30 of said Court. Copies of said Orders Nos. 1, 24 and 30, are on file with this Commission in Finance Docket Nos. 10881 and 10973.

2. That movent is the duly appointed, qualified and acting trustee of the property of Chicago and North Western Railway Company, one of the applicants in the above entitled proceeding pursuant to the orders aforesaid, and as such is now in possession of and operating the said property.

3. That on September 25, 1936, the Court in the aforesaid reorganization proceeding entered its order No. 113, a certified copy of which is hereto attached and made a part hereof, authorizing movent to apply to this Commission for an order substituting him for the Debtor as an applicant in the above entitled proceeding and authorizing him to join in the prosecution of this proceeding to a conclusion.

Wherefore, the undersigned respectfully makes this his motion for an order substituting him as such Trustee for Chicago and North Western Railway Company as one of the applicants in the above entitled proceedings.

Charles P. Megan, Trustee of the Property of Chicago and North Western Railway Company.

Chicago, Illinois, September 25, 1936.

[fol. 102] Nye F. Morehouse, 400 West Madison Street, Chicago, Illinois, Assistant General Solicitor, Chicago and North Western Railway Company.

Duly sworn to by Charles P. Megan. Jurat omitted in printing.

Certificate of Service

I hereby certify that I have this day served the foregoing documents upon all parties of record in the above entitled proceeding, by mailing a copy thereof properly addressed to their respective attorneys of record in this proceeding.

Dated at Chicago, Illinois, this 25th day of September, 1936.

Nye F. Morehouse, Assistant General Solicitor, Chicago and North Western Railway Company.

[fol. 103] Exhibit to Motion

Order No. 113

In the District Court of the United States for the Northern District of Illinois, Eastern Division

In Proceedings for the Reorganization of a Railroad

No. 60448

In the Matter of Chicago and North Western Railway Company, Debtor

Order Authorizing Trustee to be Substituted as Applicant and Prosecute Proceedings Before Interstate Commerce Commission Relative to Menominee Range Ore Pool

This matter coming on for hearing upon the petition of Charles P. Megan, Trustee, and it appearing to the Court that proper notice of such hearing and copies of said petition have been served upon all parties to this proceeding, and the Court being fully advised in the premises;

It Is Ordered:

1. That the prayer of said petition is granted and said Trustee is authorized by appropriate application or motion

before the Interstate Commerce Commission to be substi-
[fol. 104] tuted for the debtor as one of the applicants in the proceeding now pending before said Commission entitled, "In the matter of the Application of Chicago and North Western Railway Company, Escanaba, Iron Mountain and Western Railroad Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for authority to pool ore traffic from the Menominee Range to docks at Escanaba, Michigan, and to divide the earnings therefrom", I. C. C. Docket No. 26903.

2. That upon being so substituted, said Trustee is authorized to join in the prosecution of said proceeding to a conclusion.

Enter:

Barnes, District Judge.

Dated September 25, 1936.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 105] Secretary's certificate to proceedings omitted in printing.

[fol. 106] BEFORE INTERSTATE COMMERCE COMMISSION

I. C. C. Finance Docket No. 11025

In the Matter of the Application of the CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY (1) under Paragraphs 18 to 20, inclusive, of Section 1 of the Interstate Commerce Act for certificate of public convenience and necessity, authorizing the abandonment of its operation between Channing and Escanaba, a distance of approximately 63.5 miles, in Dickinson, Marquette and Delta Counties, Michigan; and (2) under Paragraph 18 of Section 1, and Section 5 (1) of the Act, for an order authorizing a pooled use and operation of certain tracks and facilities in Iron, Dickinson, Menominee and Delta Counties, Michigan, and Florence County, Wisconsin

APPLICATION—Filed November 29, 1935

[fol. 107] The Chicago, Milwaukee, St. Paul and Pacific Railroad Company hereby makes application for a certifi-

cate of public convenience and necessity, permitting the abandonment of its operation, including its operation under trackage rights over the line of the Escanaba & Lake Superior Railroad Company, between Channing and Escanaba, a distance of approximately 63.5 miles, in Dickinson, Marquette and Delta Counties, Michigan; also for an order authorizing pooled use and operation of certain tracks and facilities owned by Chicago and North Western Railway Company and Escanaba, Iron Mountain and Western Rail-
[fol. 108] road Company, in Iron, Dickinson, Menominee and Delta Counties, Michigan, and Florence County, Wisconsin.

In support of its application, and in compliance with the Commission's order issued by Division No. 4, on the 8th day of July, A. D. 1921, applicant sets forth the following information:

(a) The exact name of applicant is "Chicago, Milwaukee, St. Paul and Pacific Railroad Company".

(b) Applicant is a carrier by railroad, subject to the Interstate Commerce Act, and is engaged in interstate and intrastate commerce over its line, including the operation herein sought to be abandoned.

(c) The route and termini of the operation covered by this application are from a point on applicant's Superior Division where the line of the Escanaba & Lake Superior Railroad Company connects with applicant's line at Channing, Dickinson County, Michigan, thence southeasterly a distance of approximately 63.5 miles to applicant's ore docks in the vicinity of the City of Escanaba, Delta County, Michigan. The operation sought to be abandoned begins at Channing, in Dickinson County, passes through a portion of Marquette County, and extends to a point about one mile south of the station designated as Wells Junction, Delta County, Michigan.

(d) Abandonment of applicant's operation between Channing and Escanaba, including its operation over the line of
[fol. 109] the Escanaba & Lake Superior Railroad Company is sought.

(e) On June 29, 1935, applicant filed a petition in the District Court of the United States, for the Northern District of Illinois, Eastern Division, being Cause No. 60463

in said Court, for the reorganization of Chicago, Milwaukee, St. Paul and Pacific Railroad Company under Section 77 of the Bankruptcy Act. By order of June 29, 1935, the Court authorized and directed the Debtor, pending further order of the Court, to continue in possession and control of its properties, a copy of said order being on file with the Commission in Finance Docket No. 10882.

(f) (1) Reasons briefly stated why the abandonment of operation should be authorized are:

Since about the year 1900, applicant and its predecessor, Chicago, Milwaukee & St. Paul Railway Company, have transported iron ore from various points in the Menominee Range to their docks located on Green Bay in the vicinity of Escanaba. The principal localities for the production of iron ore on applicant's lines in the Menominee Range are Iron River, Crystal Falls, Amasa and Iron Mountain. In the year 1900, the Chicago, Milwaukee & St. Paul Railway Company (predecessor of applicant) entered into a contract with the Escanaba & Lake Superior Railroad Company, whereby it secured the right to haul ore over the line of that railroad from Channing to Escanaba. At that time, [fol. 110] the Escanaba & Lake Superior Railroad Company was extended from Watson to Channing, a distance of about 31 miles. This contract expired December 31, 1920, and prior to its expiration, a new contract, similar to the original contract, was entered into, extending the contract for a period of thirty (30) years, up to January 1, 1951. Since 1901, all iron ore handled by applicant from the Menominee Range has been concentrated at Channing and from there transported over the line of the Escanaba & Lake Superior Railroad Company under the terms of the contracts above referred to, to a point in the vicinity of Wells Junction, near Escanaba, where connection was made with applicant's yards and yard tracks leading to the ore docks. The contracts above referred to provided for the movement of this iron ore by the applicant with its own trains and train crews, and also moved in applicant's own equipment. The contracts also provided for the movement of coal westbound by applicant from its coal dock located in the vicinity of its iron ore docks at Escanaba.

All of the ore transported to the docks at Escanaba moves from the docks on boats, and the movement of ore

by applicant over the lines of the Escanaba & Lake Superior Railroad Company coincides with the season of navigation on the Great Lakes. Normally, this season opens in May and closes in November. From the closing of one season until the opening of the next, there is no operation by applicant between Channing and Escanaba over the [fol. 111] lines of the Escanaba & Lake Superior Railroad Company, and the facilities provided for the handling of the iron ore traffic, including the docks, are largely idle. In 1901, applicant's predecessor built an ore dock in the vicinity of Escanaba, and a second dock was built in 1906. These docks have never been reconstructed and both of them have now reached the point where repairs are no longer practicable.

On or about March 12, 1935, applicant, together with the Chicago and North Western Railway Company, and the Escanaba, Iron Mountain and Western Railroad Company, filed with the Commission, an application for approval, under Section 5 (1) of the Interstate Commerce Act, of a contract providing for the pooling of interstate iron ore traffic from the Menominee Range in Michigan and Wisconsin to Escanaba, Michigan. Under the plan, it was proposed to use the docks of the Chicago and North Western Railway Company at Escanaba, and the yards of that Company adjacent thereto. It was also proposed that the pooled ore would move generally over the lines of the Chicago and North Western Railway Company and the Escanaba, Iron Mountain and Western Railroad Company from points on the range where the ore originated, to the docks at Escanaba. It was also proposed that all switching required at the various mines on the range should be pooled. A study of the movement of ore from the Menominee Range [fol. 112] to the docks at Escanaba for the ten year period 1923-1932, inclusive, disclosed that during that period applicant transported to Escanaba approximately 34%, and the Chicago and North Western Railway Company approximately 66% of all ore produced on the Menominee Range, and these percentages are generally made the basis of the pooling contract, some exceptions obtaining in the case of the docks on account of their use for handling ore from the Marquette Range and in the case of certain savings which are to be divided equally.

Said application was docketed by the Commission under its Docket No. 26903, and thereafter a hearing was held thereon, at which time a considerable amount of evidence was introduced in support of that application by the petitioners therein, and evidence in objection thereto was introduced by Escanaba Chamber of Commerce, the Escanaba & Lake Superior Railroad Company and various other parties appearing in opposition to the application, all as shown by the record in Docket No. 26903.

On September 24, 1935, a report and order was made and filed in said Docket No. 26903, by Division 6 of the Commission, wherein the application for pooling hereinbefore referred to was denied, without prejudice, on the ground that before applicant herein might lawfully abandon operation over the rails of the Escanaba & Lake Superior Railroad Company between Channing and Escanaba, it must [fol. 113] procure from the Commission a certificate of convenience and necessity, permitting such abandonment; that since without such abandonment the agreement for pooling would not be practicable, the Commission denied the application in Docket No. 26903, without prejudice to the filing of another application under Section 5 (1), after a certificate of public convenience and necessity had been obtained, permitting the abandonment of operation herein sought, or the filing of an application under Section 5 (1) at the time the application for such a certificate is filed.

If applicant is to continue transporting ore from the Menominee Range to its docks at Escanaba as it has been doing since 1900, it must construct a new dock at an estimated cost of about one million dollars. The estimated annual cost to applicant of owning and maintaining such dock is approximately $110,000 per year. Under the pooling plan hereinabove referred to, a considerably fewer number of ore cars will be required to be owned and maintained by applicant. Substantial savings will also accrue to applicant from the abandonment of its yards at Escanaba. The total estimated savings to applicant, if permitted to abandon its operation over the lines of the Escanaba & Lake Superior Railroad Company between Channing and Esca- [fol. 114] naba, and to be permitted to consummate the pooling plan presented to the Commission in its Docket No. 26903, will be in excess of $125,000 per year.

Under the contract between applicant and the Escanaba & Lake Superior Railroad Company, which expires January

1, 1951, applicant pays a rental of a wheelage proportion of $54,000 per year with a minimum of 50% thereof, and amortization and interest on certain additions and betterments of approximately $1,797 per year. Even if applicant is required to continue to pay the minimum rental, abandonment of the operation herein applied for and authorization of the pooling plan presented in the Commission's Docket No. 26903, will result in savings to applicant of approximately $100,000 per year. Since the year 1929, there has been a substantial decrease in the number of tons of iron ore produced on the Menominee Range and moving to the docks at Escanaba. If applicant is to continue transporting ore from the Menominee Range to the docks at Escanaba, as it has in the past, it must construct a new dock and continue to maintain a substantially greater amount of equipment and trackage in order to accommodate that traffic, and operate under a considerably greater burden of expense than it would be required to do if pooling is permitted.

[fol. 115] (2) Reasons briefly stated why an order should be entered authorizing pooled use and operation of certain tracks and facilities owned by Chicago and North Western Railway Company and Escanaba, Iron Mountain and Western Railroad Company in Iron, Dickinson, Menominee and Delta Counties, Michigan and Florence County, Wisconsin, are:

Under the pooling plan petitioned for in Docket No. 26903, it is proposed that pooled use be made of all of applicant's tracks and of the tracks of the Chicago and North Western Railway Company in the vicinity of Iron River, Stambaugh, Palatka, Crystal Falls, Amasa and Iron Mountain, of the North Western's yards in the vicinity of its docks at Escanaba, and the docks of the Chicago and North Western Railway Company at Escanaba, Michigan. Also, said pooling plan contemplates pooled operation over the lines of the Chicago and North Western Railway Company between Iron River, Crystal Falls, Iron Mountain and Escanaba, and the line of the Escanaba, Iron Mountain and Western Railroad Company, a wholly owned subsidiary of the Chicago and North Western Railway Company between Iron Mountain and Escanaba.

It is also proposed that pooled ore be handled over the lines of applicant from Amasa to Crystal Falls or Iron

Mountain, and pooled traffic may also be handled over the lines of applicant between Amasa, Crystal Falls, Channing and Iron Mountain, Michigan.

Most of the tracks serving iron mines in the Menominee Range in the vicinity of the places hereinbefore mentioned [fol. 116] are now jointly owned and jointly operated by applicant and the Chicago and North Western Railway Company, and it is proposed that such mine tracks as are now individually owned and operated be consolidated with those tracks now jointly owned and operated. This will enable applicant to discontinue some individually owned and operated mine tracks.

(3) This application for abandonment of operation between Channing and Escanaba including operation over the lines of the Escanaba & Lake Superior Railroad Company is interwoven with and a part of the pooling plan presented to the Commission in Docket No. 26903, and the request for such abandonment and joint operation is contingent upon the granting of the application for authority for the pooling of interstate ore traffic from Menominee Range to Escanaba as set forth in the application filed in said Docket No. 26903.

(g) The name, title and post office address of the official to whom correspondence in regard to this application should be addressed are:

C. R. Sutherland, Assistant General Solicitor, C. M. St. P. & P. R. R. Co., 888 Union Station, Chicago, Illinois.

(h) Applicant is a corporation organized under the laws of the State of Wisconsin, and is authorized to operate in [fol. 117] and does operate in the following states: Washington, Idaho, Montana, North Dakota, South Dakota, Minnesota, Wisconsin, Michigan, Indiana, Illinois, Iowa and Missouri.

(i) Authority for making and filing this application is contained in a resolution by applicant's Board of Directors, passed on the 30th day of October, 1935, at applicant's New York office, 52 Wall Street, New York, N. Y., and by an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, in Cause No. 60463, for the reorganization of applicant under Sec-

tion 77 of the Bankruptcy Act, entered on the 19th day of November, 1935.

(j) Applicant does not desire a hearing on this application unless protest thereto is filed, as no abandonment of service to the public is to be made. If protest to the granting of this application is filed and a hearing thereon is had, applicant requests that this application be heard jointly with any further hearing provided for by the Commission in Cause No. 26903, in order to avoid the necessity and expense of again reintroducing the testimony pertinent hereto and already contained in the record in said Docket No. 26903.

[fol. 118] Dated at Chicago, Illinois, this 25th day of November, A. D. 1935.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by H. A. Scandrett, President. O. W. Dynes, C. R. Sutherland, 888 Union Station, Chicago, Illinois, Attorneys for Applicant.

[fol. 119] *Duly sworn to by H. A. Scandrett. Jurat omitted in printing.*

[fol. 120] BEFORE INTERSTATE COMMERCE COMMISSION

I. C. C. Finance Docket No. 11025

[Title omitted]

SUPPLEMENTAL APPLICATION—Filed January 17, 1936

Come now Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and respectfully represent that they have an interest in the above entitled proceeding, and desire to be made parties applicant thereto, and for grounds thereof, state:

1. That on or about the 29th day of November, 1935, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation of the State of Wisconsin, filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity, permitting [fol. 121] and authorizing the abandonment of its opera-

tion under trackage rights over the line of the Escanaba & Lake Superior Railroad Company, between Channing and Escanaba, approximately 63.5 miles, in Dickinson, Marquette and Delta Counties, Michigan, and for an order authorizing pooled use and operation of certain tracks and facilities in Michigan and Wisconsin; that said cause is still pending before this Honorable Commission;

2. That on June 29, 1935, petition was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, being Cause No. 60463 in said Court, for the reorganization of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, under Section 77 of the Bankruptcy Act. By order of June 29, 1935, the Court authorized and directed the Debtor, pending further order of the Court, to continue in possession and control of its properties. By order of October 17, 1935, the Court appointed Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company. Copies of said orders are on file with the Commission in Finance Docket No. 10882. On December 28, 1935, the Commission ratified the appointment of said Trustees, and on January 1, 1936, the said Trustees, having filed bond in the amount fixed by the Court, assumed their duties.

3. That by the order of the Court appointing them, the Trustees were empowered and directed, subject to the con-
[fol. 122] trol of the Court, the jurisdiction of the Interstate Commerce Commission, and, consistently with the provisions of Amended Section 77 of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto, to manage, operate and conduct the business of the Debtor (Chicago, Milwaukee, St. Paul and Pacific Railroad Company); to run, manage, maintain and operate and keep in proper condition and repair the railroad and properties of the Debtor wherever situated; that the said Trustees believe that the granting of said application will be in the interest of and to the benefit of the property of the Debtor (Chicago, Milwaukee, St. Paul and Pacific Railroad Company) now in their possession and being operated by them.

Wherefore, said Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, pray for an order of the Commission joining them as parties applicant to this proceeding.

Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by Henry A. Scandrett, One of said Trustees.

O. W. Dynes, C. R. Sutherland, 888 Union Station, Chicago, Illinois, Attorneys for Applicants.

[fol. 123] *Duly sworn to by Henry A. Scandrett. Jurat omitted in printing.*

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record by mailing a copy thereof, properly addressed, to each party whose appearance is shown by the record.

Dated at Chicago, Illinois, this 15th day of January, A. D. 1936.

C. R. Sutherland, Of Counsel for Applicants.

[fol. 124] Before Interstate Commerce Commission

Finance Docket No. 11025

[Title omitted]

Return to Questionnaire—Abandonment, by Chicago, Milwaukee, St. Paul and Pacific Railroad Company in re Abandonment of its Operation Between Channing and Escanaba, Michigan—Filed January 29, 1936

[fol. 125] The Chicago, Milwaukee, St. Paul and Pacific Railroad Company having made application to the Interstate Commerce Commission, under paragraphs 18 to 20, inclusive, of Section One of the Interstate Commerce Act for Certificate of Public Convenience and Necessity authorizing the abandonment of its operation between Channing and Escanaba, a distance of approximately 63.5 miles in Dickinson, Marquette and Delta Counties, Michigan, which application is filed in the office of the Commission in Finance

Docket No. 11025, hereby affirms that notice of the application has been published in the form prescribed by the Commission at least once during each of three consecutive weeks, in the following newspapers:

Escanaba Daily Press, Beginning December 24, 1935.
Iron Mountain News, Beginning December 21, 1935.
Marquette Mining Journal, Beginning December 26, 1935

that said newspapers are of general circulation in Dickinson, Marquette and Delta Counties, Michigan, which are the only counties in which the operation sought to be abandoned is situated and that the newspaper clippings attached hereto contain true copies of the notices as published in said newspapers.

Escanaba Daily Press

Iron Mountain News

Marquette Mining Journal

Notice

Chicago, Milwaukee, St. Paul and Pacific Railroad Company hereby gives notice that on the 29th day of November, 1935, it filed with the Interstate Commerce Commission at Washington, D. C., its application for a certificate of public convenience and necessity (1) permitting abandonment of operation, under trackage rights, over the line of the Escanaba & Lake Superior Railroad Company between Channing and Escanaba, approximately 63.5 miles, in Dickinson, Marquette, and Delta Counties, Mich., and (2) for an order authorizing pooled use and operation of certain tracks and facilities in Michigan and Wisconsin.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

The Applicant also submits the following information required by the Commission:

1. When the line in question was constructed, for what purpose or purposes, and its history as an operating unit from the time of construction up to the date of this return.

Ans. The operation sought to be abandoned consists of operation under trackage rights over the line of the Escanaba and Lake Superior Railroad between Channing and

Escanaba, a distance of approximately 63.5 miles in Dickinson, Marquette and Delta Counties, Michigan.

[fol. 126] Since about the year 1900, applicant and its predecessor, Chicago, Milwaukee & St. Paul Railway Company, have transported iron ore from various points in the Menominee Range to their docks located on Green Bay in the vicinity of Escanaba. The principal localities for the production of iron ore on applicant's lines in the Menominee Range are Iron River, Crystal Falls, Amasa and Iron Mountain. In the year 1900, the Chicago, Milwaukee & St. Paul Railway Company (predecessor of applicant) entered into a contract with the Escanaba & Lake Superior Railroad Company, whereby it secured the right to haul ore over the line of that railroad from Channing to Escanaba. At that time, the Escanaba & Lake Superior Railroad Company was extended from Watson to Channing, a distance of about 31 miles. This contract expired December 31, 1920, and prior to its expiration, a new contract, similar to the original contract, was entered into, extending the contract for a period of thirty (30) years, up to January 1, 1951. Since 1901, all iron ore handled by applicant from the Menominee Range has been concentrated at Channing and from there transported over the line of the Escanaba & Lake Superior Railroad Company under the terms of the contracts above referred to, to a point in the vicinity of Wells Junction, near Escanaba where connection was made with applicant's yards and yard tracks leading to the ore docks. The contracts above referred to provided for the movement of this iron ore by the applicant with its own trains and train crews, and also moved in applicant's own equipment. The contracts also provided for the movement of coal westbound by applicant from its coal dock located in the vicinity of its iron ore docks at Escanaba.

All of the ore transported to the docks at Escanaba moves from the docks on boats, and the movement of ore by applicant over the lines of the Escanaba & Lake Superior Railroad Company coincides with the season of navigation on the Great Lakes. Normally, this season opens in May and closes in November. From the closing of one season until the opening of the next, there is no operation by applicant between Channing and Escanaba over the lines of the Escanaba & Lake Superior Railroad Company, and the facilities provided for the handling of the iron ore traffic, including the docks, are largely idle. In 1901, ap-

plicant's predecessor built an ore dock in the vicinity of Escanaba, and a second dock was built in 1906. These docks have never been reconstructed and both of them have now reached the point where repairs are no longer practicable.

[fol. 127] 2. The general history of any past or existing receivership covering the line.

Ans. On March 18, 1925, H. E. Byram, Mark W. Potter and Edward J. Brundage were appointed receivers of the railroads, property and franchises of the Chicago, Milwaukee and St. Paul Railway Company, by order of the District Court of the United States, for the Northern District of Illinois, Eastern Division, and from March 18, 1925 to January 13, 1928, inclusive, the said receivers were in full possession, charge of and operation of said railway system and property during such receivership.

As of midnight January 13, 1928 the entire property and its operation were taken over by the Applicant. On June 29, 1935, applicant filed a petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, being Cause No. 60463 in said Court for the reorganization of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, under Section 77 of the Bankruptcy Act. By order of June 29, 1935, the Court authorized and directed the Debtor, pending further order of the Court, to continue in possession and control of its properties. By order of October 17, 1935, the Court appointed Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company. Copies of said orders are on file with the Commission in Finance Docket No. 10882. On December 28, 1935, the Commission ratified the appointment of said Trustees, and on January 1, 1936, the said Trustees, having filed bond in the amount fixed by the Court, assumed their duties.

3. The investment cost of the line as shown by the Applicant's books stated as nearly as possible according to the primary accounts prescribed in the Interstate Commerce Commission classification of investment in road and equipment.

Ans. Not applicable. The operation sought to be abandoned is not over line owned by the Applicant. Applicant

merely desires authority to discontinue operation under trackage rights over the Escanaba & Lake Superior Railroad.

4. Whether any aid, gift, grant or donation of anything of value was contributed in consideration of its construction.
Ans. Not applicable.

[fol. 128] 5. The amount and description of any bonds, notes or other evidences of indebtedness resting in whole or in part upon the line in question, or upon the earnings thereof, or upon the earnings of any other line or lines of the Applicant not covered by the application, and of any evidences of indebtedness not resting specifically upon the line in question, but which may be affected by the proposed abandonment.
Ans. Not applicable. See answer to Question 1.

6. A copy of the Applicant's general balance sheet as of the latest date for which such statement is available.
Ans. See Exhibit attached as appendix A.

7. A copy of the Applicant's income account for each of the five years next preceding the current year and of such income account for that portion of the current year for which figures are available.
Ans. See Exhibit attached as appendix B.

8. If the application covers less than the entire mileage operated by Applicant, the Gross and Net Revenue and Gross and Net Income for the portion sought to be abandoned, allocated thereto on a mileage prorate basis.
Ans. Not applicable. Applicant does not desire to discontinue handling ore between the Range and Escanaba and Applicant does not serve any of the communities between Escanaba and Channing. Through discontinuance of use of the line between Channing and Escanaba and the pooling of ore with the Northwestern, as set out in the application, Applicant proposes to increase its Net Income.
A statement of Revenues, Expenses and Income applicable to the portion of the line which Applicant now operates under trackage rights and accrued to that line on a mileage prorate basis would not reflect the worth of that line to Applicant.

9. A full explanation of the statements filed in response to the last preceding question, showing the method used and

the probable effect of continued operation upon the Applicant's System Earnings as a whole, with reasons for the conclusion.

Ans. Not applicable. See answer to Question 8.

10. The names of all cities and incorporated villages located upon the line in question, by counties, with the approximate population of each, and the source of the information as to such population, and the names of all other railroads serving them.

Ans. Not applicable. Applicant does not now serve any of the towns between Channing and Escanaba except Channing which will not be disturbed and Escanaba which it serves only in connection with the handline of ore and the small amount of coal destined to Applicant's lines in Michigan.

[fol. 129] 11. The approximate population of the whole territory tributary to the line in question, with explanation of the method by which the limits of such territory were defined.

Ans. Not applicable. See answer to Question 10.

12. The distance in miles from another line of railroad of each city or village named in question 10.

Ans. Not applicable. See answer to Question 10.

13. The names of all railroads with which the line in question connects for interchange of traffic and the points of such connection and interchange.

Ans. Interchange of traffic is now made with the Escanaba & Lake Superior Railroad at Channing, Michigan, and for coal only at Escanaba and Wells. The proposed abandonment of operation will not necessarily disturb existing arrangements of traffic with the E. & L. S. Under the pooling plan in Docket 26903 the C. & N. W. will act as agent for Applicant in interchanging traffic at Escanaba.

14. The tonnage handled by the line in question classified by principal commodities, for each of the five years next preceding the current year, stating separately the tonnage (A) originating and destined to points on the line, (B) interchanged with connecting carriers and moving over other lines.

Ans. Not applicable. See answer to Question 8.

15. The nature of industries located in the territory tributary to the line, such as farming, mining, lumbering, manufacturing, etc., how long established and the extent to which each such industry is dependent upon the line in question for transportation.

Ans. Not applicable. The Applicant in its use of the Escanaba & Lake Superior Railroad does not serve any industry in the territory between Channing and Escanaba.

16. The passenger traffic handled on the line in question for each of the five years next preceding the current year, giving separately the number of local and connecting line passengers (if the latter designation is applicable) and the revenue derived from each class.

Ans. Not applicable. The Applicant does not handle any passengers between Channing and Escanaba.

17. If the volume of traffic, freight or passenger, or both, has diminished during recent years, any reasons which may be assigned for such decrease.

Ans. Not applicable.

18. What effort, if any, has been made to dispose of the line in question so as to insure continued operation.

Ans. Not applicable. Applicant does not have any ownership in the line the use of which is sought to be abandoned.

[fol. 130] Question No. 19. Opinion of Counsel:

As Counsel in charge of the Law Department of Henry A. Scandrett, Walter J. Cummings and George I. Haight, the Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, I am of the opinion that the proposed abandonment of operation between Channing and Escanaba, Michigan, is within the powers vested in said Trustees by Section 77 of the Act of July 1, 1898, as amended by the Act of August 27, 1935, and by orders by the Judge of the District Court of the United States in which reorganization proceedings of Chicago, Milwaukee, St. Paul and Pacific Railroad Company are pending, and that said operation may be abandoned, if and when the application therefor shall have been approved by this Honorable Commission. I am also of the opinion that said abandonment is consistent with the proper performance by said Trustees of service to the public as a common car-

rier and will not impair their ability to perform that service and is reasonably necessary and appropriate for such purposes.

O. W. Dynes, Counsel.

[fol. 131] 20. All reasons relied upon in support of the application.

Ans. On or about March 12, 1935, Applicant, together with the Chicago and North Western Railway Company, and the Escanaba, Iron Mountain and Western Railroad Company, filed with the Commission, an application for approval, under Section Five (1) of the Interstate Commerce Act, of a contract providing for the pooling of interstate iron ore traffic from the Menominee Range in Michigan and Wisconsin to Escanaba, Michigan. Under the plan, it was proposed to use the docks of the Chicago and North Western Railway Company at Escanaba, and the yards of that Company adjacent thereto. It was also proposed that the pooled ore would move generally over the lines of the Chicago and North Western Railway Company and the Escanaba, Iron Mountain and Western Railroad Company from points on the range where the ore originated, to the docks at Escanaba. It was also proposed that all switching required at the various mines on the range should be pooled. A study of the movement of ore from the Menominee Range to the docks at Escanaba for the ten year period 1923-1932, inclusive, disclosed that during that period Applicant transported to Escanaba approximately 34%, and the Chicago and North Western Railway Company approximately 66% of all ore produced on the Menominee Range, and these percentages are generally made the basis of the pooling contract, some exceptions obtaining in the case of the docks on account of their use for handling ore from the Marquette Range and in the case of certain savings which are to be divided equally.

Said application was docketed by the Commission under its Docket No. 26903, and thereafter a hearing was held thereon, at which time a considerable amount of evidence was introduced in support of that application by the petitioners therein, and evidence in objection thereto was introduced by Escanaba Chamber of Commerce, the Escanaba & Lake Superior Railroad Company and various other parties appearing in opposition to the application, all as shown by the record in Docket No. 26903.

On September 24, 1935, a report and order was made and filed in said Docket No. 26903, by Division 6 of the Commission, wherein the application for pooling hereinbefore referred to was denied, without prejudice, on the ground that before applicant herein might lawfully abandon operation over the rails of the Escanaba & Lake Superior Railroad Company between Channing and Escanaba, it must procure from the Commission a certificate of convenience and necessity, permitting such abandonment; that since without such abandonment the agreement for pooling would not be practicable, the Commission denied the application in Docket No. 26903, without prejudice to the filing of another application under Section 5 (1), after a certificate of public convenience and necessity had been obtained, permitting the abandonment of operation herein sought, or the filing of an application under Section 5 (1) at the time the application for such a certificate is filed.

If Applicant is to continue transporting ore from the Menominee Range to its docks at Escanaba as it has been [fol. 132] doing since 1900, it must construct a new dock at an estimated cost of about one million dollars. The estimated annual cost to Applicant of owning and maintaining such dock is approximately $110,000 per year. Under the pooling plan hereinabove referred to, a considerably fewer number of ore cars will be required to be owned and maintained by Applicant. Substantial savings will also accrue to Applicant from the abandonment of its yards at Escanaba. The total estimated savings to Applicant, if permitted to abandon its operation over the lines of the Escanaba & Lake Superior Railroad Company between Channing and Escanaba, and to be permitted to consummate the pooling plan presented to the Commission in its Docket No. 26903, will be in excess of $125,000 per year.

Under the contract between Applicant and the Escanaba & Lake Superior Railroad Company, which expires January 1, 1951, Applicant pays a rental of a wheelage proportion of $54,000 per year with a minimum of 50% thereof, and amortization and interest on certain additions betterments of approximately $1,797 per year. Even if Applicant is required to continue to pay the minimum rental, abandonment of the operation herein applied for and authorization of the pooling plan presented in the Commission's Docket No. 26903, will result in savings to Applicant of approximately

$100,000 per year. Since the year 1929, there has been a substantial decrease in the number of tons of iron ore produced on the Menominee Range and moving to the docks at Escanaba. If Applicant is to continue transporting ore from the Menominee Range to the docks at Escanaba, as it has in the past, it must construct a new dock and continue to maintain a substantially greater amount of equipment and trackage in order to accommodate that traffic, and operate under a considerably greater burden of expense than it would be required to do if pooling is permitted.

21. A tracing of the original map or a blue print or white print of the original tracing on sheets 24″ x 56″ with plain lined margins, the inside dimensions of which shall be 23″ x 55″, drawn to a scale of 1″ = 200′ or 1″ = 400′, showing the location and route of the line affected by the proposed abandonment, with its relation, within the limits of the sheet, to other railroads and other common carriers in the same territory. Also a skeleton index or route map, drawn to a scale of not less than ¼″ = 1 mile, on which shall be shown the line proposed to be abandoned, with its relation to other railroads or other common carriers that are within 20 miles on either side thereof and which shall be shown at any convenient place on the first sheet of the map described above, if desired, or on a separate sheet of the dimensions given above, all to be substantially in accordance with map order, so called, pertaining to steam railway carriers, made and entered by the Commission under date of January 12, 1914, and modified and supplemented by Valuation Orders Nos. Five (5), Six (6) and Twenty Three (23).

Ans. Map of the general territory of the line over which abandonment of operation is sought is attached hereto.

[fol. 133] *Duly sworn to by Henry A. Scandrett. Jurat omitted in printing.*

pendix "A"

CHICAGO, MILWAUKEE T. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR
Henry A. Scandrett, walter J. Cummings, George I. Haight, Trustees,

GENERAL BALANCE SHEET AS OF NOVEMBER 30, 1935

ASSET SIDE

	INVESTMENTS			
701	Investment in road and equipment			
	Road			$563,911,815.95
	Equipment			116,859,409.33
	General Expenditures			239,447.32
	Total			$681,010,672.60
702	Improvements on leased railway property			
	Road			$ 230,675.06
	Equipment			177,979.51
	General Expenditures			-
	Total			$ 408,654.57
		Total Book Assets Nov. 30, 1935	Respondent's Own Issues Included	
704	Deposits in lieu of mortgaged property sold	$43,495.23	None	$ 43,495.23
705	Miscellaneous physical property			5,585,988.35
706	Investments in affiliated companies:			
	(A) Stocks			$ 5,464,843.87
	(B) Bonds			1,497,801.00
	(C) Notes			10,544,856.97
	(D) Advances			6,619,851.41
707	Other Investments:			
	(A) Stocks			8,284.80
	(B) Bonds			92,600.00
	(C) Notes			50,387.60
	(D) Advances			3,500.00
	(E) Miscellaneous			260.00
	Total investments			$711,331,196.40
	CURRENT ASSETS			
708	Cash			$8,392,116.03
		Total Book Assets Nov. 30, 1935	Respondent's Own Issues Included	
711	Special deposits	$117,487.72	None	$117,487.72
712	Loans and bills receivable			12,876.97
713	Traffic and car-service balances receivable			463,506.60
714	Net balance receivable from agents and conductors			2,513,736.47
715	Miscellaneous accounts receivable			2,752,183.92
716	Material and Supplies			8,236,654.24
717	Interest and dividends receivable			462,277.61
719	Other current assets			36,360.95
	Total current assets			$22,987,200.51
	DEFERRED ASSETS			
720	Working fund advances			$51,797.70
721	Insurance and Other Funds			1,687.50
722	Other deferred assets			2,320,449.13
	Total deferred assets			$2,373,934.33
	UNADJUSTED DEBITS			
723	Rents and insurance premiums paid in advance			$25,675.29
725	Discount on funded debt			359,000.23
			Par Values of Holdings Nov. 30,1935	
727	Other Unadjusted debits			$3,782,774.32
728	Securities issued or assumed-Unpledged		$943,000.00	
729	Securities issued or assumed-Pledged		20,494,000.00	
	Total unadjusted debits			$4,167,449.84

LIABILITY SIDE

		Total Book Liability Nov. 30, 1935	Respondent's Holdings Included	
	STOCK			
751	Capital Stock	$224,465,834.56	None	$224,465,834.56
	Total stock			$224,465,834.56
	GOVERNMENTAL GRANTS			
754	Grants in aid of construction			$204,722.12
	LONG TERM DEBT			
		Total Book Liability Nov. 30, 1935	Respondent's Holdings Included	
755	Funded debt unmatured	$485,718,602.71	$21,136,000.00	$464,582,602.71
	Total long-term debt			$464,582,602.71
	CURRENT LIABILITIES			
758	Loans and bills payable			$6,325,348.89
759	Traffic and car-service balances payable			2,195,593.44
760	Audited accounts and wages payable			6,776,472.91
761	Miscellaneous accounts payable			199,637.93
762	Interest matured unpaid			6,477,156.80
764	Funded debt matured unpaid			$ 10,473,581.50
766	Unmatured interest accrued			4,494,307.38
767	Unmatured rents accrued			268,098.95
768	Other current liabilities			748,159.47
	Total current liabilities			$37,958,357.27
	DEFERRED LIABILITIES			
770	Adjustment Mortgage Bond Interest Accrued - Unmatured			$51,357,028.77
770	Other deferred liabilities			2,889,000.81
	Total deferred liabilities			$54,246,029.58
	UNADJUSTED CREDITS			
771	Tax liability			$6,273,536.95
776	Accrued depreciation - Equipment			41,170,665.03
778	Other unadjusted credits			3,789,510.64
	Total unadjusted credits			$51,233,712.62
	CORPORATE SURPLUS			
779	Additions to property through income and surplus			$513,687.68
780	Funded debt retired through income and surplus			43,104.16
	Total Appropriated Surplus			$556,791.84
784	Profit and Loss, Debit Balance			*$92,388,269.62
	Total corporate surplus (Deficit)			*$91,831,477.78
	GRAND TOTAL			$740,659,381.04

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees

INCOME ACCOUNT

Years 1930 to 1934, inclusive

Items	Year 1934	Year 1933	Year 1932	Year 1931	Year 1930
I. OPERATING INCOME					
Railway Operating Revenues	$87,859,792	$85,495,220	$84,900,833	$111,423,772	$142,569,632
Railway Operating Expenses	69,655,547	64,596,841	72,078,119	89,269,446	112,295,805
Net Revenue from Railway Operation	18,204,245	20,898,379	12,822,714	22,154,326	30,273,827
Railway Tax Accruals	6,405,000	6,942,500	7,921,000	8,723,000	9,501,000
Uncollectible Railway Revenues	23,500	28,044	34,901	20,322	19,230
Railway Operating Income	11,775,745	13,927,835	4,866,813	13,411,004	20,753,597
II. NONOPERATING INCOME					
Rent from Locomotives	31,896	20,378	33,287	49,260	81,570
Rent from Passenger-Train Cars	64,670	53,233	51,335	77,207	86,208
Rent from Floating Equipment	2,518	2,278	2,515	2,471	3,574
Rent from Work Equipment	19,419	13,956	33,626	37,809	34,061
Joint Facility Rent Income	445,876	343,732	460,505	458,384	429,158
Income from Lease of Road	424,859	423,713	420,468	419,452	364,224
Miscellaneous Rent Income	373,027	339,962	413,238	449,819	437,340
Miscellaneous Nonoperating Physical Property	122,879	128,271	214,993	261,660	215,905
Dividend Income	347,383	193,767	204,312	191,407	810,865
Income from Funded Securities	102,048	110,743	115,383	416,176	752,056
Income from Unfunded Securities and Accounts	25,612	61,657	147,414	342,682	618,150
Income from Sinking and Other Reserve Funds	-	-	-	943	5,079
Miscellaneous Income	6,202	6,837	3,322	2,888	16,798
Total Nonoperating Income	1,966,389	1,698,527	2,100,398	2,710,158	3,854,988
Gross Income	13,742,134	15,626,362	6,967,211	16,121,162	24,608,585
III. DEDUCTIONS FROM GROSS INCOME					
Hire of Freight Cars-Debit Balance	2,590,655	2,468,958	2,677,140	2,404,759	1,991,678
Rent for Locomotives	45,710	48,171	46,298	48,228	76,069
Rent for Passenger-Train Cars	183,581	158,098	142,712	169,673	181,300
Rent for Floating Equipment	1,651	1,279	1,322	4,404	7,264
Rent for Work Equipment	13,397	12,985	20,929	5,869	13,202
Joint Facility Rents	2,966,077	3,074,602	3,077,796	3,068,796	3,164,107
Rent for Leased Roads	1,110,392	1,112,290	1,113,979	1,107,513	1,094,090
Miscellaneous Rents	37,023	47,941	21,722	44,891	63,318
Miscellaneous Tax Accruals	30,525	30,126	52,989	16,872	40,328
Interest on Funded Debt	22,638,274	22,935,574	22,981,736	23,003,276	22,786,616
Interest on Unfunded Debt	329,302	104,712	55,352	12,416	37,140
Amortization of Discount on Funded Debt	21,788	23,291	24,799	26,062	17,481
Miscellaneous Income Charges	21,380	20,476	20,115	21,162	21,401
Total Deductions from Gross Income	29,989,755	30,038,503	30,236,889	29,933,921	29,493,994
Net Income or Deficit	• 16,247,621	• 14,412,141	• 23,269,678	• 13,812,759	• 4,885,409
IV. DISPOSITION OF NET INCOME					
Income applied to Sinking and Other Reserve Funds	-	-	-	9,978	9,407
Income balance transferred to Profit and Loss	• 16,247,621	• 14,412,141	• 23,269,678	• 13,822,737	• 4,894,816

• Deficit

Includes Chicago, Terre Haute and Southeastern Ry.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees

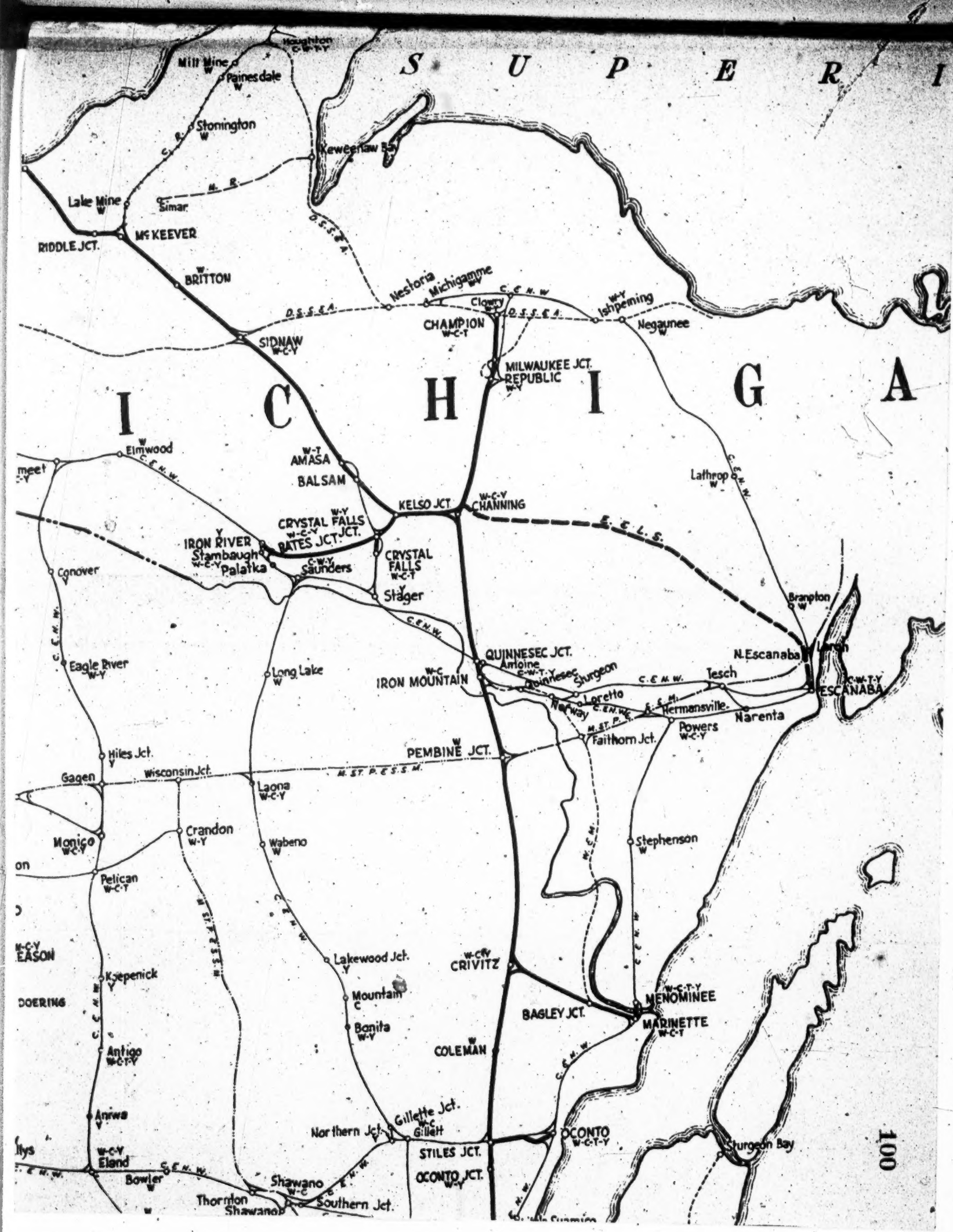
INCOME ACCOUNT

Eleven Months ended November 30, 1935.

Acct. No.	Items	Eleven Months ended Nov. 30, 1935
	I. OPERATING INCOME	
(A)	**RAILWAY OPERATING INCOME:**	
501	Railway operating revenues	$84,684,391.21
531	Railway operating expenses	70,449,053.21
	Net revenue from railway operations	14,235,338.00
532	Railway tax accruals	5,535,000.00
533	Uncollectible railway revenues	25,767.32
	Railway operating income	8,674,570.68
(B)	**RENT INCOME:**	
504	Rent from locomotives	40,810.63
505	Rent from passenger - train cars	62,476.10
506	Rent from floating equipment	2,246.97
507	Rent from work equipment	24,127.70
508	Joint facility rent income	383,318.66
	Total rent income	512,980.06
(C)	**RENTS PAYABLE:**	
536	Hire of freight cars - Debit balance	2,404,073.74
537	Rent for locomotives	48,443.54
538	Rent for passenger - train cars	204,944.92
539	Rent for floating equipment	2,561.87
540	Rent for work equipment	15,664.04
541	Joint facility rents	2,730,725.48
	Total rents payable	5,406,413.59
	Net rents	• 4,893,433.53
	Net railway operating income	3,781,137.15
	II. OTHER INCOME	
509	Income from lease of road	$389,508.48
510	Miscellaneous rent income	363,522.23
511	Miscellaneous nonoperating physical property	116,859.20
513	Dividend income	187,272.35
514	Income from funded securities	95,436.65
515	Income from unfunded securities and accounts	10,810.27
519	Miscellaneous income	• 2,124.46
	Total other income	1,161,284.72
	Total Income	4,942,421.87
	III. MISCELLANEOUS DEDUCTIONS FROM INCOME	
543	Miscellaneous rents	31,286.92
544	Miscellaneous tax accruals	30,861.15
551	Miscellaneous income charges	24,394.39
	Total miscellaneous deductions	86,542.46
	Income available for fixed charges	4,855,879.41
	IV. FIXED CHARGES	
542	Rent for leased roads	1,015,774.97
546	Interest on funded debt	
	(a) Fixed interest	12,141,961.07
547	Interest on unfunded debt	476,898.07
548	Amortization of discount on funded debt	18,703.31
	Total fixed charges	13,653,337.42
	Income after fixed charges	• 8,797,458.01
	V. CONTINGENT CHARGES	
	Interest on funded debt	
	(b) Contingent interest (Interest on Adjustment Mortgage Bonds)	8,381,710.92
	Net Income	• 17,179,168.93

• Denotes red figure

Includes Chicago, Terre Haute and Southeastern Ry.


S U P E R I
I C H I G A
Houghton C-W-T-Y
Mill Mine W
Paines dale W
Stonington W
C. R.
Keweenaw Bay
M. R.
Simar
Lake Mine W
McKEEVER
RIDDLE JCT.
BRITTON W
D.S.S.S.A.
Nestoria
Michigamme W
C.E.N.W.
Clowry
D.S.S.S.A.
W-Y
Ishpeming
Negaunee W
CHAMPION W-C-T
SIDNAW W-C-Y
MILWAUKEE JCT.
REPUBLIC W-Y
Elmwood W
C.E.N.W.
W-T
AMASA
BALSAM
KELSO JCT.
W-C-Y
CHANNING
Lathrop W
C.E.N.W.
E.S.L.S.
W-Y
CRYSTAL FALLS W-C-Y
BATES JCT. JCT.
IRON RIVER Y
Stambaugh W-C-Y
Palatka
C-W-Y
Saunders
CRYSTAL FALLS W-C-T
Stager Y
Conover Y
C.E.M.W.
Brampton W
C.E.N.W.
QUINNESEC JCT.
Amoine C-W-T-Y
Quinnesec
Sturgeon
C.E.M.W.
Tesch
N. Escanaba
Lorain
C-W-T-Y
ESCANABA
Eagle River W-Y
Long Lake W
IRON MOUNTAIN W-C
Loretto
Railway
C.E.M.W.
S.M.
Hermansville
Narenta
M.ST.P.
Powers W-C-Y
Faithorn Jct.
Hiles Jct. Y
PEMBINE JCT. W
Gagen
Wisconsin Jct.
M.ST.P.&S.S.M.
Laona W-C-Y
Crandon W-Y
Monico W-C-Y
Wabeno W
Stephenson W
Pelican W-C-T
Lakewood Jct. Y
CRIVITZ W-C-Y
Mountain C
Banita W-Y
COLEMAN W
BAGLEY JCT.
W-C-T-Y
MENOMINEE
MARINETTE W-C-T
C.E.M.W.
Antigo W-C-T-Y
Aniwa Y
Northern Jct. Y
Gillette Jct. W-C
Gillett
CONTO W-C-T-Y
Sturgeon Bay
W-C-Y
Eland
Bowler W
C.E.M.W.
Shawano W-C
C.E.M.W.
Thornton
Shawano
Southern Jct.
STILES JCT.
OCONTO JCT. W-Y
100

100

		Par Values of Holdings Nov. 30,1935			
727	Other Unadjusted debits		$3,782,774.32		
728	Securities issued or assumed-Unpledged	$943,000.00			
729	Securities issued or assumed-Pledged	20,494,000.00			
	Total unadjusted debits		$4,167,449.84		
	GRAND TOTAL		$740,859,781.08	GRAND TOTAL	$740,859,781.08

State of Illinois)
) SS
County of Cook)

$ Excludes $301,000 matured funded debt held by or for respondent and not cancelled.
* Denotes red figures.

W. W. K. SPARROW being duly sworn, deposes and says that he is the Officer in charge of Finance, Accounting and Real Estate of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor; that he has examined the foregoing balance sheet, and that the same is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 13th day of January, A. D. 1936.

(Signed) FRED. J. STOWELL
Notary Public.

(SIGNED) W. W. K. SPARROW

[fol. 138] Secretary's certificate to proceedings omitted in printing.

[fol. 139] BEFORE INTERSTATE COMMERCE COMMISSION

No. 26903

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed March 30, 1935

The Escanaba and Lake Superior Railroad Company, a common carrier subject to the Interstate Commerce Act, respectfully represents that it has an interest in the matters involved in the above entitled proceeding and desires to intervene in and become a party thereto; and for grounds of intervention states:

I

Your petitioner for many years past has operated and now operates a main line of railway from Escanaba to Channing, all within the State of Michigan, over which it transports freight and passengers in interstate commerce and in state commerce. Its lines connect at Channing with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and in or adjacent to the City of Escanaba, it connects with the rails of Chicago and North Western, Chicago, Milwaukee, St. Paul and Pacific and Minneapolis, St. Paul & Sault Ste. Marie Railway Companies, common carriers subject to the Act and referred to hereafter for convenience as the North Western, Milwaukee, and Soo Line Railroads.

[fol. 140]

II

That for many years, petitioner has had a contractual arrangement with the Milwaukee Road, whereby the latter has operated ore trains over the main line of your petitioner from Channing to Escanaba and has transported ore destined to the docks in Escanaba, paying certain rentals for said trackage rights.

III

That the above entitled application of the three railroads named therein, for authority to pool ore traffic from the

Menominee Range to docks at Escanaba, Michigan, if approved and made effective, is apparently intended to accomplish a diversion of all ore traffic from the route over the petitioner's railroad and if effective, threatens serious injury to this petitioner.

IV

That your petitioner was not informed by the applicants of their purpose to effect such pooling arrangement and had no notice of this application until petitioner's officers first learned of the same through articles appearing in the public press on or about the 18th day of March; and that petitioner first obtained a copy of the application on or about the 26th day of March.

V

That your petitioner believes the proposed application is not in the public interest, but is opposed to the public interest and not required by any reasonable rights or necessities of the applicants; that the granting of such application and the conduct of pooling operations thereunder will not improve the service or lessen the charges, or otherwise inure to the benefit of shippers or the public.

[fol. 141] Wherefore your petitioner prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted, and that the Commission shall take such action in the premises as it may find necessary and appropriate, under the jurisdiction conferred upon it by the Interstate Commerce Act.

Dated at Wells, Michigan, this 28th day of March, 1935.

Escanaba and Lake Superior Railroad Company, by George N. Harder, General Manager. John S. Burchmore, Its Attorney. Walter, Burchmore & Belnap, Of Counsel, 1522 First National Bank Bldg., Chicago, Ill.

[fol. 142] *Duly sworn to by Geo. N. Harder. Jurat omitted in printing.*

[fol. 143] BEFORE INTERSTATE COMMERCE COMMISSION

No. 26903

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed March 30, 1935

Comes now your petitioner, Escanaba Chamber of Commerce, and respectfully represents that it has an interest in the matters involved in the above entitled proceeding, and desires to intervene in and become a party thereto; and for grounds of the proposed intervention says:

I

That petitioner is a non-profit corporation, organized under the laws of Michigan, formed, among other purposes, to promote the civic, economic and social welfare of the people of Escanaba and vicinity.

II

For many years, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and predecessor have transported iron ore in large volume over the main line of Escanaba and Lake Superior Railroad Company to the ore docks in the City of Escanaba, by virtue of trackage or contractual rights [fol. 144] over said latter railroad, from mines and shipping points in the so-called Menominee Range.

That for many years past, Chicago and North Western Railway Company likewise has transported ore from said Monominee Range to ore docks in the City of Escanaba, the loaded ore trains moving eastbound over a certain branch of said railway, formerly known as Escanaba, Iron Mountain and Western Railroad, between Iron Mountain and Escanaba, the ore cars when made empty returning westbound, however, via another line of said Chicago and North Western Railway, i. e., via Powers and Iron Mountain.

That the application of the said carriers, entitled as above, seeks authorization for the pooling of their ore traffic from the said Menominee Range to the said docks at Escanaba, so that the entire ore traffic shall move over the latter route, and not over the Escanaba and Lake Superior Railroad.

III

That the Escanaba and Lake Superior Railroad Company serves many communities who ship freight to and receive freight from Escanaba and via Escanaba and said carrier operates general freight service and passenger trains whereby the public is afforded passenger, mail, express and freight service to and from Escanaba. The continued and efficient operation of said railroad is of vital interest and importance to the communities served thereby and to the city and residents and business houses of Escanaba and vicinity.

[fol. 145] That the officers of this petitioner are informed and believe that if the proposed pooling arrangement becomes effective and the ore traffic is taken from Escanaba and Lake Superior Railroad Company, the result will be of serious jeopardy to said railroad and its threatened abandonment, because of the resulting inadequacy of its revenues to meet its necessary expenses.

IV

That the aforesaid branch of Chicago and North Western Railway Company, formerly known as Escanaba, Iron Mountain and Western Railroad, serves no local communities and there is no general freight service over that branch and no passenger, mail or express service to or from Escanaba; and that said branch is utilized chiefly, if not exclusively, for aforesaid movement of loaded ore trains to Escanaba.

V

No public notice of the filing of the application herein, or of the intention to effect such pooling arrangement was given by the applicants; and the officers of this petitioner first learned of the same through items in the public press appearing on or about the 18th day of March. They were not able to obtain a copy of the aforesaid application until the 26th day of March.

VI

Your petitioner respectfully suggests that the proposed application is not in the public interest but, on the contrary, is against the public interest, as the facts appear to peti-

[fol. 146] tioner and its officers; and therefore your peti-

tioner desires to participate in said proceeding for the full development of the facts and to protect the interests of its membership.

Wherefore your petitioner prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted, and that the Commission shall take such action in the premises as it may find necessary and appropriate, under the jurisdiction conferred upon it by the Interstate Commerce Act.

Dated at Escanaba, Michigan, this 28th day of March, 1935.

Escanaba Chamber of Commerce, Escanaba, Michigan, by H. P. Lindsay, Secretary, P. H. Connelly, Traffic Manager. Nuel D. Belnap, Luther M. Walter, John S. Burchmore, Its Attorneys. Walter, Burchmore & Belnap, Of Counsel, 1522 First National Bank Bldg., Chicago, Ill.

[fol. 147] *Duly sworn to by H. P. Lindsay. Jurat omitted in printing.*

[fol. 148] BEFORE INTERSTATE COMMISSION

I. C. C. Finance Docket No. 11025

[Title omitted]

PETITION FOR LEAVE TO INTERVENE

Now comes your petitioner, Escanaba and Lake Superior Railroad Company and respectfully represents that it has an interest in the matters involved in the above entitled proceeding and desires to intervene in and become a party to said proceeding and for grounds of the proposed intervention says:

I

Petitioner is a common carrier by railroad, engaged in interstate transportation, subject to the provisions of the Interstate Commerce Act, and operates a main line extend-

ing from Escanaba and Wells, Michigan, to Channing, Michigan.

[fol. 149] II

In and by the aforesaid application, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, (hereinafter referred to as the Milwaukee Road), requests conditionally a certificate of convenience and necessity authorizing abandonment by it of operation between Channing and Escanaba over the aforesaid line owned by Escanaba and Lake Superior Railroad Company.

In and by said application herein, the Milwaukee Road individually also seeks authority for the pooling of certain traffic with the Chicago and North Western Railway Company, (hereinafter referred to as the North Western Line), as heretofore proposed in a proceeding known as No. 26903 on the general docket of the Commission, which was disposed of in the report and order of Division 6, (Commissioners Eastman, McManamy, and Lee) entered September 24, 1935 and reported 210 I. C. C. 599.

The aforesaid request for authority to abandon operation is conditioned by applicant upon the granting of approval of the aforesaid pooling arrangement.

No other carrier joins in the above entitled application.

III

Your petitioner is opposed to the granting of the aforesaid certificate of convenience and necessity authorizing abandonment of operation by Milwaukee Road over the line owned by intervener between Channing and Escanaba and submits that said application should be denied. That the results of such abandonment would be against the public interest and seriously detrimental to your intervener and to the communities served by your petitioner's line.

Your petitioner is opposed to the application in this proceeding, for approval of the aforesaid pooling plan and submits that it should be denied.

[fol. 150] IV

Concurrently with the filing of the aforesaid application herein, the said Milwaukee Road also filed with the Commission its individual petition for reopening and for further hearing in the aforesaid No. 26903, to which petition this

intervener has filed its formal reply requesting, among other things, that the Commission shall finally dismiss No. 26903 for want of jurisdiction.

V

The iron ore traffic proposed to be pooled now moves and for years has moved from the Menominee Range over two main routes: (a) via the North Western Line through Iron Mountain, Michigan, and thence over rails owned by Escanaba, Iron Mountain and Western Railroad, and (b) via Milwaukee Road to Channing and thence over rails owned by Escanaba and Lake Superior Railroad, by virtue of trackage rights enjoyed over such line by the Milwaukee Road. The North Western and the Milwaukee, as well as the first mentioned lessor, Escanaba, Iron Mountain and Western Railroads joined as applicants in No. 26903. The Escanaba and Lake Superior Railroad is not an applicant, although involved in the ore traffic as owner of the railroad used and grantor of so-called trackage rights under which it receives revenues predicated in part on the tonnage of ore transported over said line.

Your petitioner protests that the request for approval of the pooling arrangement should not be considered by the Commission for the following reasons:

(a) The proposed pooling is not presented by or assented to by all the carriers involved, as required by paragraph (1) of Section 5 of the Act;

[fol. 151] (b) The application herein is defective because it is made only by one carrier involved; and this application properly to be filed on the Commission's general docket is improperly merged with and included in this application filed on the finance docket.

Your petitioner further suggests, if notwithstanding the foregoing objections, the Commission is persuaded that it should give further consideration to the proposed pooling arrangement, it will be observed that the plan submitted contemplates abandonment by the North Western Line of all operations over its so-called Amasa Branch,*

* See page 8 of original application in No. 11025 and paragraphs 6, 7, 36, 37, and 51 of pooling agreement, Appendix A to application.

extending from Crystal Falls, Wisconsin, to Amasa, Wisconsin; the North Western Line has not filed application for certificate of convenience and necessity authorizing such abandonment; and therefore this pooling arrangement may not properly be approved, for the same reasons for which it was disapproved in the aforesaid report of September 24, 1935, entered in No. 26903.

Wherefore, said Escanaba and Lake Superior Railroad Company prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted; and your petitioner further prays that the aforesaid application be denied by the Commission as not well founded in law and that the same shall be dismissed, [fol. 152] for the reasons hereinabove set forth, first as to the request for approval of the pooling plan and second as to the conditional request for abandonment certificate; and your petitioner further prays that if the aforesaid application is not denied forthwith, as invalid in law, that the Commission will assign the matter for hearing at Escanaba, Michigan, according to the customary procedure in matters of abandonment.

Dated at Chicago, Illinois, December 20, 1935.

Escanaba and Lake Superior Railroad Company, by E. L. Richardson, President. Nuel D. Belnap, Luther M. Walter, John S. Burchmore, attorneys for Petitioner. Walter, Burchmore & Belnap, of Counsel, 1522 First National Bank Bldg., Chicago, Illinois.

[fol. 153] *Duly sworn to by E. L. Richardson. Jurat omitted in printing.*

Certificate of Service

I hereby certify that I have this day served the foregoing document upon counsel for applicant, by mailing a copy thereof properly addressed to each counsel.

Dated at Chicago, Ill., this 21st day of December, 1935.

John S. Burchmore, of Counsel for Petitioner.

[fol. 154] IN UNITED STATES DISTRICT COURT

In Equity No. 831

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed by and between the parties of the above entitled cause, acting by their respective counsel, for the purpose of settling the record for the appeal therein to the Supreme Court of the United States:

1. Appellant, Escanaba and Lake Superior Railroad Company, waives its seventh assignment of error upon which it prayed appeal, in which it charged that the District Court erred,

"In concluding as a matter of law that the Commission's findings and conclusions, as set forth in its reports of September 24, 1935 and November 18, 1936, are supported by substantial evidence."

and will not rely upon or urge the same in the prosecution of its appeal, or in brief or oral argument, before the Supreme Court.

2. The within and foregoing statement of evidence is a true and correct transcript in narrative form of part of the oral testimony introduced at hearings before the Interstate Commerce Commission in the proceedings styled In the Matter of the Application of the Chicago & North Western Railway Company, Escanaba, Iron Mountain & Western [fol. 155] Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company for authority to Pool Ore Traffic from the Menominee Range to Docks at Escanaba, Michigan and to Divide the Earnings therefrom, Docket No. 26903, and In the Matter of the Application of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company for a Certificate to Abandon Operation including Trackage Rights in Dickinson, Marquette and Delta Counties, Michigan and for Pooled use and Operation of Certain Tracks and Facilities in Michigan and Wisconsin, Finance Docket No. 11025, as the same is contained in the official

typewritten transcript thereof on file with the Commission, a copy of which, duly certified by the Commission, together with the exhibits referred to therein, was offered in evidence by the plaintiff in this Court in the above entitled cause. This transcript, in narrative form, of the testimony, together with said exhibits, numbered 1 to 11, both inclusive, 11A, 12 to 16, both inclusive, 16A, 17 to 21, both inclusive, 21A, 22 to 33, both inclusive, F-1, F-1A, and F-2 to F-16, both inclusive is so much of the evidence introduced in the proceedings before the Commission as the parties hereto deem to be essential in the determination of the appeal in said cause.

3. This narrative, together with the original certified copy of the exhibits before the Interstate Commerce Commission introduced in evidence in this Court shall be transmitted in original form, instead of a transcript thereof, by the Clerk of this Court to the Clerk of the Supreme Court and shall there be retained as a part of the record in this cause and may be referred to by counsel for any party in their briefs and upon oral argument of this cause in the Supreme Court.

Dated August 31, 1937.

John S. Burchmore, Clark M. Robertson, Solicitors for Escanaba and Lake Superior Railroad Company. Elmer B. Collins, P., Special Assistant to the Attorney General. J. Stanley Payne, Counsel for Interstate Commerce Commission. C. R. Sutherland, Counsel for Henry A. Scandrett, etc., Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 156] Order

It is ordered that the attached and foregoing stipulation and narrative statement of evidence thereto attached be and they are hereby approved, and that in preparing his certificate and transmitting transcript of record to the Supreme Court of the United States, the Clerk is directed to proceed in accordance with that stipulation.

Dated September 1, 1937.

Fred M. Raymond, United States District Judge.

[fol. 157] BEFORE INTERSTATE COMMERCE COMMISSION

No. 26903

In the Matter of the Application of Chicago & North Western Railway Company, Escanaba, Iron Mountain & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for Authority to Pool Ore Traffic from the Menominee Range to Docks at Escanaba, Michigan, and to Divide the Earnings Therefrom

Narrative Statement of Evidence

Chicago, Illinois, April 12, 1935,
10:00 o'clock A. M.

Before C. E. Stiles, Examiner

Met pursuant to notice.

Exam. Stiles: Gentlemen, the Interstate Commerce Commission has assigned for hearing at this time and place No. 26903, application of Chicago & North Western Railway Company, et al. for authority to pool ore traffic from Menominee Range to docks at Escanaba, Michigan, and to divide earnings therefrom.

Who appear for the applicants?

APPEARANCES

Mr. Morehouse: Nye F. Morehouse, for the Chicago & North Western Railway Company.

Mr. Sutherland: C. R. Sutherland, for the Chicago, Milwaukee, St. Paul & Pacific Railway Company.

Exam. Stiles: Are there any appearances for other parties on behalf of the application?

Are there appearances in opposition to the application?

Mr. Burchmore: John S. Burchmore, and associates, for the Escanaba & Lake Superior Railroad Company, whose intervening petition has been filed and allowed by the Commission. I wish to state that Mr. E. L. Richardson, president of the company, a member of the Milwaukee bar, and Mr. [fol. 158] J. E. Morgan, vice-president of the company, are present. Neither of them, however, have been admitted to

practice before the Commission. Mr. Richardson is an attorney.

I desire also to enter the appearance of the Escanaba Chamber of Commerce, together with Mr. P. H. Connelly as traffic manager, Mr. H. P. Lindsay, the secretary, who is not a practitioner. He is also present. The intervening petition of the Escanaba Chamber of Commerce was filed and allowed. Both of these clients are in opposition to the application.

Mr. Hook: Representative Frank E. Hook of the 12th District of Michigan appearing for all parties in opposition to the petition. I am an attorney authorized to practice, but not authorized before the Commission. I wish to enter my appearance in behalf of those opposing the petition.

Exam. Stiles: Are there any others?

Mr. Boone: Mr. Examiner, I desire to enter an appearance on behalf of the Brotherhood of Locomotive Firemen and Enginemen, in so far as our members employed on the Chicago, Milwaukee, St. Paul & Pacific and on the Escanaba & Lake Superior are concerned, in protest against the granting of the application of the railroads.

Exam. Stiles: Have you been admitted to practice before the Commission?

Mr. Boone: I have not.

Mr. Emerson: I beg to say that I make the same statement that Mr. Boone made, as representing the Engineers on the Chicago, Milwaukee, St. Paul & Pacific, as well as the Railway Trainmen, J. F. Emerson, Brotherhood of Locomotive Engineers.

[fol. 159] Mr. Hughes: Mr. Chairman, I would like to enter the same plea as Mr. Emerson and Mr. Boone, in behalf of the Conductors employed on the Chicago, Milwaukee, St. Paul & Pacific Railway.

Exam. Stiles: What is your name, please?

Mr. Hughes: R. O. Hughes.

Exam. Stiles: Are there any others?

Mr. Morehouse: Mr. Emerson, was yours the Trainmen and the Engineers?

Mr. Emerson: Trainmen and Engineers.

Exam. Stiles: The applicants may call their first witness.

GEORGE W. HAND, being first duly sworn, testified as follows:

[fol. 160] Direct examination.

By Mr. Morehouse:

I am assistant to the president, Chicago & North Western Railway, Chicago, Illinois. I am familiar with the application in this case and the proposed contract attached to it. As stated in the application this contract is in ten-ative form and a contract has now been developed in its final form. Exhibit No. 1 (received in evidence) is the final form of the contract and has been executed by one of the railroads and will be executed by the other tomorrow when its president returns here (Rec. 6-7).

Mr. Morehouse: I may state for the benefit of counsel on the other side that this present form of contract is substantially the same as the one attached to the petition. The parties have, in the meantime, gone through the thing very carefully and ironed out the language a little bit here and there, to try to make the thing express more clearly the intent of the parties, but there is no change in any of the essential parts of the thing at all from that which is attached to the application (Rec. 7-8).

The Witness: I have been familiar with the negotiations from the inception of this proposal for the pooling arrangement. It comes up now because the Milwaukee Road's docks are completely worn out. It was originated some years ago and discussed and a ten-ative plan formulated so that as soon as there was a necessity for it, we would have a plan to put into effect (Rec. 8).

I have prepared two small maps to show the territory and facilities. One of these (Exhibit No. 2 received in evidence) bears the title of "Map showing Milwaukee and North Western Lines between Menominee Iron Ore Range and Escanaba, Michigan," and shows a portion of the northern peninsula of Michigan and the northern part of the State of Wisconsin. It shows considerably more territory than is directly involved in this pooling arrangement, so that the field in which pooling is sought might be seen with reference to other territory surrounding it. For instance, the map shows Green Bay, Marquette, Michigan and Ashland, Wis-

consin. It shows the rail lines and some of the towns in in-
[fol. 161] tervening territory; also Green Bay and a little of Lake Superior (Rec. 9).

The Menominee Iron Ore Range as defined by geologists is shown on this map with the border of it shown by a dash line. The area within this boundary is tinted a light yellow color (Rec. 9).

The principal points involved in the pooling arrangement are Escanaba, Iron Mountain, Iron River and Crystal Falls, all in the State of Michigan (Rec. 9).

The rail lines of the North Western over which the ore that it is proposed to pool will be transported are shown in red. The lines of the Milwaukee over which some of it is to be transported are shown in yellow. The line between Crystal Falls and Amasa, in green, is a branch line of the North Western which, if this pooling plan is authorized, will no longer be needed by the North Western and will be proposed later on for abandonment. Provisions are made in the pooling plan for the continuation of North Western service to Amasa and Balsam, which are two points on this line which are shown in green, over the tracks of the Milwaukee, in the event permission is later obtained to abandon this branch. Some of this traffic will move out to Iron Mountain over the yellow line of the Milwaukee and some of it will move into Crystal Falls and there be delivered to the North Western, and the portion of the Milwaukee line that would be used for that traffic extending between Kelso Junction and Crystal Falls is colored brown on the map. The line used by the Milwaukee in handling ore heretofore between Channing and Escanaba is in violet; that is the line of the Escanaba & Lake Superior which they have used under contract giving them trackage rights to operate between Escanaba and Channing (Rec. 10).

The letters W, C, Y, T, etc., appearing on this map have no
[fol. 162] reference to the situation discussed here (Rec. 11).

The map Exhibit No. 3 (received in evidence) bears the title "Ore Docks and Trackage of the C. M. St. P. & PP. RR. Co. and C. & N. W. & Co. at Escanaba." It is a map of the immediate vicinity of Escanaba. It shows the tracks and docks of the North Western which it is proposed to use in this pooling scheme colored in red, and the tracks and the docks of the Milwaukee proposed to be abandoned in green. Exhibits Nos. 1, 2 and 3 were received at this point (Rec. 11-12).

Iron ore has been mined on the Menominee Range for many years. It is loaded into cars at the mines and hauled to Escanaba, where it is unloaded into ore docks especially constructed for the purpose of receiving it from the cars in which it — hauled and transferring it into boats. From Escanaba it is transported in boats to various lake ports where it is unloaded. These are chiefly in the vicinity of Chicago, Illinois and Cleveland, Ohio (Rec. 12).

The North Western began hauling ore from this Range prior to 1880. By 1890 the volume of ore handled by the North Western was as high as four million tons annually. From that time on the production and movement of ore has been more or less constant. The output varies quite widely at times but over long periods, say for ten years, it has averaged about three and one-half million tons a year. In 1914, for instance, the tonnage was less than three million; in 1916 it was five and one-half million; in 1918 three and one-half million; 1920 almost five million; 1921 only one million; 1929 over five and one-half million. During the last four years the tonnage has been comparatively small.

There is, however, a large amount of iron ore still in this district and from such information as we can secure it is expected that ore will be produced here for fifty years longer at least, but it seems likely that the annual production will not be often as great in the future as it has been in the past (Rec. 13).

The Milwaukee Road has also been hauling ore to Escanaba from the same Range for many years, and it has had [fol. 163] docks similar to those of the North Western. The Milwaukee's tonnage has averaged about half of that moved by the North Western and has fluctuated from year to year in about the same way as it has on the North Western (Rec. 13).

Because of the large annual tonnage occasionally produced in peak years, much greater potential handling capacity in docks, trackage and equipment is necessary than would be required if the annual production was more evenly uniform. Owing to the fact that the ore is moved from Escanaba by boats, the movement can occur only during the season of navigation on the Great Lakes. Normally the season opens in May and closes in November. The period of full volume generally extends from sometime in June to sometime in October, lasting, therefore, only about five

months. From the closing of one season till the opening of the next, the railroads' facilities provided for the traffic are largely idle. From this it will be seen that the investment has only a comparatively short time each year in which it can be utilized (Rec. 13-14).

There are a large number of mines within the range. During the past twelve or thirteen years 43 different mines have been in operation. They have never all been in operation at any one time, but during that time that many have produced ore. The mines are not distributed evenly over the area. They are in groups at various locations. At Iron River there are 12 mines, at Stambaugh 8, at Palatka 4, at Crystal Falls 10, at Amasa 2, at Alpha 2, at Iron Mountain 2, at Norway-Vulcan 3. There are also some mines at Florence, Wisconsin, and at Commonwealth, Wisconsin, but they have not been shipping ore lately. They are still billing points for ore, however (Rec. 14).

Each of these localities, therefore, is a distinct producing area within the general area of ore production. From the map it will be seen that Iron River, Stambaugh and Palatka are comparatively close together and that the other localities of production are several miles apart (Rec. 14-15).

The Wisconsin mines mentioned are on the piece of line running through that State shown about midway between [fol. 164] Stager and Iron Mountain. That line is about nineteen miles long (Rec. 15).

On this account each area has to have certain defined local service performed in the placing of cars and in gathering up the loaded ore. In a smaller way, no less definitely, each production mine has to be treated as a unit in arranging the transportation service from day to day (Rec. 15).

The method of loading ore is largely from stock piles, although some of it is also loaded directly into cars at the shafts as it is hoisted. Mines operate more or less continuously in the production and hoisting of ore. It is brought to the surface and deposited in large piles called stock piles near the shaft. During the period when ore is not being shipped the operating mines continue to pile it up and when they begin shipping the tracks are laid alongside the stock piles and the ore is then loaded into cars by steam shovels. It can be loaded comparatively rapidly in this manner. Cars are supplied for loading by switch engines, and when loaded are taken from the mines to various assembly yards.

At these assembly yards they are made up into train loads for movement to the docks at Escanaba. The North Western has assembly yards at Iron River, Stambaugh, Palatka, Crystal Falls, Antoine, Norway and Vulcan. The Milwaukee has such yards near Iron River, at a place called Bates, at Crystal Falls, and at a point near Iron Mountain which is called Quinnesec Junction (Rec. 15-16).

Ore is hauled from these yards to Escanaba in various ways, some of it in trains operating for other purposes, i. e., way frieghts and time freights. During the busy season, however, the larger share by far is handled in solid ore trains, which may be started from any one of the base yards just referred to. In order to get the ore moved from each producing line as desired by the shippers, it is often necessary to start trains from the most distant points, picking up whatever ore is there ready to go, and gathering up additional cars at other points as the trains go along until [fol. 165] they are filled to capacity. All of the ore produced here that is moved on the North Western to Escanaba, except that produced at Norway and Vulcan, passes through Iron Mountain or Antoine. Antoine is the yard located a mile west of the Iron Mountain station and is used for the purpose of accumulating ore in sufficient quantities to make full tonnage trains from there eastward (Rec. 16).

The North Western has two lines of railroad fairly close together from Antoine to Escanaba which in handling ore are operated as a double track system, eastbound ore moving over the more northerly of the two tracks and trains carrying empty cars moving westerly over the more southerly from Escanaba to Antoine. This method of operation gives carrying capacity many times that of a single track railroad (Rec. 17).

Ore produced in the vicinity of Norway and Vulcan which is about a mile and a half east of Norway (Vulcan not being shown on the map) moves directly eastward over a short connection to a junction with the northerly line at Sturgeon. When sufficient ore is produced in this area to make trainloads possible, these trains go directly to Escanaba, otherwise trains coming from Antoine fill out with Norway tonnage at Sturgeon. The essential feature of the arrangement, however, is that it is a double track operation of large potential capacity (Rec. 17).

The North Western has a yard of sufficient capacity at Escanaba to handle all of the ore arriving so that it can be made up into switch runs as required to go on the docks directly east of the yards as shown on the small map. All of the trackage utilized has been planned and developed to facilitate the expeditious and economical movement of ore (Rec. 17-18).

At the present time the North Western has two serviceable docks at Escanaba, one known as Dock No. 5 and the [fol. 166] other as Dock No. 6 and both constructed of timber. Dock No. 5 has three hundred and seventy pockets and a total capacity of ninety two thousand five hundred tons. Dock No. 6 has three hundred and twenty pockets and a total capacity of eighty thousand tons. Dock No. 6 is the newer but both are in serviceable condition, having recently been repaired and their capacity is such that from five to six million tons can be handled in an ore shipping season. Under most favorable conditions six million tons could probably be handled. There are many obvious factors having a bearing on the total capacity in a shipping season such as the length of the season itself, degree of regularity of shipments and regularity or lack of regularity of boat movements (Rec. 18-19).

With two companies handling ore separately, the amount of ore which either can handle through its dock in any season is less than it would be if the ore was pooled because of the practice of shippers of alternating shipments from one road to the other. The shippers also mix ores in the docks to obtain definite chemical combinations or grades for each cargo. The degree of refinement and the number of grades has been greatly increased in recent years. To meet the requirements of this practice has resulted in many complications. Each car of ore is sampled at the mine as it is loaded and the disposition of it thereafter is controlled by the result of the sample and the use that can be made of it in building up the definite cargo contents desired. This practice makes necessary more dock space and more cars for a movement of the same tonnage than would be required if these mixtures were not being made, so that the pooling arrangements will be beneficial because it will permit of building up the same cargo-s in less time and with less facilities and less complicated switching and hauling, by making all of the ore produced every day available collec-

[fol. 167] tively, and further by eliminating the necessity of frequent movement of boats from a dock of one company over to that of the other to complete the loading (Rec. 19).

Dock No. 5, the older of the two North Western docks, was originally constructed in 1891 and substantially rebuilt in 1910. It has, therefore been 25 years since it was rebuilt. Its condition now is such that it will need to be entirely replaced above its foundation in a comparatively short time. This, of course, will depend also on the amount of ore that it is called on to handle within the next few years. Dock No. 6, originally constructed in 1902, was rebuilt in 1925, and has fifteen or sixteen more years of serviceable life before it will need to be replaced (Rec. 20).

Docks of this character consist essentially of three parts, a foundation of piling below the water, above that heavy timber framework a little over forty feet high and above this the pocket system, consisting of lighter framework with bins of plank construction, with mechanism connected therewith for discharging ore into boats. Extending from the shore end of the dock is a timber trestle gradually diminishing in height from the top of the dock to the ground. It is called the "approach trestle" and carries the tracks for moving cars from the ground to the top of the dock. The pile foundation being under water is not subject to decay and will last indefinitely. The heavy timber structure carrying the pocket system has a life of approximately 25 years under normal conditions. The more intensively a structure is used the less its life to some extent. If used very steadily and very heavily each year replacement would probably be necessary in 20 years, but with less use it would perhaps last 30 years. The timber pocket system above the heavy framework being constructed of smaller timber and subjected to more wear is of shorter life, so in a practical way the whole dock has to be replaced every 25 or 30 years, and the upper part or pocket system about twice [fol. 168] in that length of time. The trestle approach likewise has timbers of varying potential life and has to be carried through a similar cycle of replacement (Rec. 20-22).

The lighter planking and bracing timber and some heavier supporting timbers have to be renewed in from five to ten years on the average and extensive repairs therefore go on each year to keep the dock in workable condition (Rec. 22).

Each pocket has a door called a gate and is also equipped with a spout hinged at the bottom of the pocket which can be lowered to carry the ore down into the boat. These and the mechanism provided to operate them are subjected to wear and have to be replaced at comparative frequent intervals. The maintenance of such docks is therefore expensive (Rec. 22).

The original cost of each of these two docks was close to $1,750,000.00. About one third of this amount needs to be replaced twice in the life of the dock, and one half of it at the end of the dock's usefulness. The remainder is in the foundation and does not have to be replaced. The repairs needed each year vary from $20,000 to $80,000 per dock. There are four tracks on each dock (Rec. 22-23).

The Milwaukee Road has a similar system of facilities consisting of mine tracks and base yards at various points on the Range and has two docks of wooden construction at Escanaba. These docks are smaller than those of the North Western. The Milwaukee Road also has a yard at Escanaba connected with its docks but does not own a line of railroad all the way from the mine to Escanaba. It has used the railroad of the Escanaba and Lake Superior between Channing and Escanaba. This is a single track railroad. The docks of the Milwaukee are both very old and can no longer be used, and if the Milwaukee should continue separately to handle ore it would be obliged to construct one or more new docks (Rec. 23).

Both companies knew that the separate handling of ore by both of them has made necessary many more facilities [fol. 169] than would be essential if all the ore could be handled collectively via one route and by one organization. Some thought was given to the matter of a pooling plan over five years ago. A pooling plan has been worked out between the Northern Pacific and the Soo Line for handling ore from the Cayuna Range in Northern Minnesota to Superior, which was working successfully. Principally since the ore traffic fell off abruptly in 1930 and 1931, the necessity of doing anything about it was not so urgent, since both companies had an abundance of surplus plants for the small volume of ore. It was realized, however, that whenever the movement of ore increased, worthwhile results could be attained, and a study of the situation made by each of us. We each looked over our respective facilities and considered various schemes and finally concluded

that the one which would yield the best results, from the standpoint of economy and efficiency and which would bring about the greatest improvement of service to the public, would be by the utilization of the North Western's tracks and docks (Rec. 24).

Many of the tracks in the mining territory were already jointly owned. The North Western has performed switching service for the Milwaukee at the mines in the vicinity of Iron River. The North Western's Lines, only, reaches the mines at Norway and Vulcan. The ore produced at Iron Mountain could be moved much more readily to Escanaba over the North Western tracks than over the Milwaukee tracks. From mines at Crystal Falls there is very little difference in distance by either route. The branches of the North Western leading from the main tracks to the mines at Iron River, Palatka and Stambaugh, and at Alpha, have better grades than those of the Milwaukee. All of the ore from those mines, therefore, could be handled directly over the tracks of the North Western, with a saving of mileage and with no new trackage of any kind. Use of the Milwaukee would have required considerable additional trackage in the way of connecting leads and additional base yards properly connected with the Milwaukee's main line. Since the Milwaukee has no connection to the Norway-Vulcan district, and in other regions has been handling about one half as much tonnage as the North Western, it had never provided for facilities for the entire tonnage [fol. 170] while the North Western has (Rec. 24-25).

Similarly at Escanaba, the Milwaukee docks are completely worn out, while the North Western Docks have substantial useful life still remaining (Rec. 25).

The carrying capacity of the main lines was likewise involved. The North Western tracks are so situated that they have been used as a double track system from Antoine to Escanaba and they have the capacity for moving the whole tonnage over one route. The yard track system of the North Western at Escanaba was properly located to co-ordinate the switching operations with the North Western docks. The Milwaukee yard alone was not sufficient in size for the entire tonnage. To have used it in conjunction with the North Western docks would have created an awkward and expensive operating condition. Conclusion was therefore reached that the only feasible plan was to

develop the arrangement along the lines of using the North Western's property (Rec. 25-26).

The remainder of the study was devoted to working out the basis for handling and the proper division of cost and revenue between the two companies. The tonnage handled by the two companies during the ten years prior to the time we made the study, in 1932, was studied and it was concluded that it would be fair to divide the revenue of the future on the basis it had actually earned during that period. The study was therefore based on the years 1923 to 1932, both inclusive. During this time the two companies handled 40,748,690 tons of ore from the Menominee Range. The tonnage handled by the North Western was 26,834,260 tons. The tonnage handled by the Milwaukee was 13,914,430 tons. The North Western proportion therefore, was 66 per cent, and the Milwaukee 34 per cent. These per cents were adopted for the division of revenue and also for the division of switching expense and for the future maintenance [fol. 171] and construction of tracks at the mines used in gathering and assembling the ore. These percentages are likewise to be used in the division of the hauling expense and other items of expense incidental to the transportation of ore tonnage (Rec. 26-28).

The maintenance of tracks used in the hauling of ore arising as a result of the use of the tracks will likewise be divided in the same proportion. The North Western will furnish 66 per cent of the equipment necessary, and the Milwaukee 34 per cent, and each company will bear the total cost of maintaining the equipment which it supplies (Rec. 27-28).

A great deal of the trackage at the mines is owned jointly by the two companies and this as well as that separately owned, to extent needed in the future, will be contributed without any payment by either company to the other (Rec. 28).

We estimate 22 miles of mine service tracks, mine leads, base yards, etc., in the vicinity of the mines will not be needed after the pool is formed and can be removed. In addition the North Western will be able to abandon its branch line from Crystal Falls to Amasa, which is fifteen miles in length, and the Milwaukee can abandon its yard at Escanaba (Rec. 28).

At the time we completed our studies early in 1933, we felt the occurrence that would make the plan advantageous would be an increase in the ore traffic which would have developed at once the necessity on the part of the North Western to replace its Dock No. 5 and the Milwaukee's replacement of its docks with new structures, since all of them were in such shape physically that they could not handle full tonnage. Owing to the fact, however, that the [fol. 172] tonnage was so light during the past four years, we have been able to get along with the existing structures up to this time (Rec. 28-29).

During 1932 and 1933 the North Western handled the Milwaukee's ore, principally through Dock No. 6, with a small portion through Dock No. 5 during the busiest part of the season. In 1934 the Milwaukee handled its ore in one of its old docks, after making some repairs, and as a result the North Western got along with Docks 5 and 6 without very heavy repairs (Rec. 29).

During 1933 the North Western made substantial repairs on Dock No. 5 and during this past winter has repaired Dock no. 6, as well as Dock No. 5, so that they are both now in shape for service and during this year can handle all of the ore of both companies that it is anticipated will be offered for shipment. The Milwaukee's docks, however, are now completely worn out and can no longer be used. The immediate necessity, therefore, for putting the pooling arrangement into effect arises to save the Milwaukee the cost of building a new dock (Rec. 29-30).

If the ore is pooled, the capacity of the North Western docks will suffice. As soon as sufficient increase in volume to warrant it occurs, Dock No. 5 will be replaced by a new structure which need not be of much greater capacity than present Dock No. 5, although some increase will probably be needed if the tonnage to be handled in any one year again reaches a total of six million or more tons. If the ore is not pooled, the total capacity of North Western docks would be needed for handling North Western ore alone, and the Milwaukee would be forced to provide a separate dock for itself. The way in which the ore is brought from the mines to the docks has a great deal to do with the amount of dock capacity needed to handle it after it gets there, so [fol. 173] that the pooling arrangement provided for is a

necessary condition precedent to the utilization of the docks themselves in this efficient manner (Rec. 30).

The essential features of the arrangement from the standpoint of the relationship of each company to it are these:

First. The proportions to be used for dividing revenue and expenses associated with the handling of pooled traffic, called "Pool Percentages" in the contract are North Western 66 per cent, Milwaukee 34 per cent; the actual proportion of tonnage during the ten years ending with 1932 being the basis for this.

Second. Compensation for use of property. As to the docks, the compensation to be paid by the Milwaukee to the North Western is definitely related to the value of the property employed. The North Western docks are to be used. This line uses its docks at Escanaba for the handling of ore from the Marquette Range as well as from the Menominee Range. The Milwaukee does not serve the Marquette Range and consequently that traffic is not included in the pool. The relationship of the tonnage from the Marquette Range to the total from both Ranges during the same ten years was determined and it was found that the ratio of the Milwaukee's proportion of the Menominee Range tonnage, that is 34 per cent thereof, was equal to 30.2 per cent of all the tonnage handled. This percentage was then adopted as the basis of apportioning compensation for the use of the docks as well as certain expenses associated with ownership of docks. It was agreed that the Milwaukee would pay the North Western 30.2 per cent of a reasonable rate of return upon the North Western's investment in its present docks and any new capital that might thereafter be invested in the [fol. 174] construction of new docks or in the making of additions and betterments. Because the Milwaukee was abandoning its dock and sacrificing its investment in the foundation thereof, it was agreed that this loss should be shared by both parties. To accomplish this a credit on payment to be made by the Milwaukee to the North Western on the value of the latter company's foundation was worked out and it was also agreed that no rental would be paid by the Milwaukee on the value of present Dock No. 5, which will not last much longer and which will have relatively high maintainance costs as long as it is used. The Milwaukee will pay 30.2 per cent of 4 per cent per annum on the agreed

value of Dock No. 6, less an allowance for one-half the value of the foundation being given up by the Milwaukee in its dock, and in the future 30.2 per cent of any interest hereafter paid by the North Western on new money invested (Rec. 31-32).

As compensation for the use of other North Western properties, that is, trackage and other facilities over which the pooled traffic will be handled, no effort was made to determine any rate of return or valuation, but instead the compensation adopted is a division of saving that could be made by the Milwaukee in discontinuing its operations over the line it now uses. The amount of money expended by the Milwaukee during this same ten year period for items which it could cease incurring expenditures for if the pooling arrangement were put into effect was ascertained, and this amount was divided by the tonnage of ore handled during the period and the rate per ton thereby established. It was agreed that the Milwaukee should pay to the North Western one-half of this amount for each ton of its share of the ore [fol. 175] in the pool in the future. The rate per ton thus developed was 2.762 cents. For each million tons of ore, therefore, hereafter handled in the pool, the Milwaukee will pay the North Western $8,390 on this account (Rec. 32-33).

A basis for the division of expenses suitable and applicable to each phase of the operation has been developed. In connection with docks, the Milwaukee will pay 30.2 per cent of the maintenance, insurance premiums, fire protection, watchmen service and taxes. All other operating expenses at the dock as incurred will be divided between the two companies on the basis of the Milwaukee bearing 34 per cent of such proportion of the total cost as the tonnage from the Menominee Range currently handled bears to the total tonnage from both Ranges currently handled (Rec. 33).

All transportation expenses and similar items of expense connected with the assembling of ore and hauling the same from the Range to the docks will be divided between the two companies on the basis of the pool percentages of each (Rec. 33).

Suitable provisions are contained in the contract for allocating the portions of expense to the pooled traffic which are common to pooled traffic and other traffic (Rec. 33-34).

Maintenance of way expenses are to be divided into two parts; those arising out of the maintenance of tracks in the

vicinity of the mines used exclusively in connection with handling of ore will be divided directly on the basis of pool per cents. Maintenance of way expenses on property used in transporting ore from the Range to the docks will be separated into two parts. That part which is determined to be incurred on account of use of the property will be divided between the North Western and the Milwaukee on the basis of pool per cents. Here, again, suitable provisions are contained for allocating portions of any items of expense which are incurred as a result of handling pooled and non-pooled [fol. 176] traffic to the pooled traffic first and thereafter dividing the same between the two companies (Rec. 34).

Each company will furnish its proportion of equipment necessary to handle the ore from time to time, and each company will bear its pool proportion of the cost of maintaining equipment, largely by performing the maintenance work itself (Rec. 34).

If this pooling arrangement goes into effect, the North Western will have no need for its branch line extending from Crystal Falls to Amasa, a distance of 15 miles, since the ore traffic originating in this territory will be in the pool. Arrangements are contained in the contract for the Milwaukee to handle the North Western's other traffic originating at the two stations on the line, known as Amasa and Balsam, out to a connection with the North Western. The North Western will reimburse the Milwaukee for the cost of moving such traffic and the North Western will retain the revenue thereon. Consequently, the North Western's service will continue to embrace these points and this traffic is not to be pooled. The savings arising from the abandonment of this branch, which were ascertained to be $2,681 per year, will be divided equally between the two companies (Rec. 34-35).

Likewise, the Milwaukee will be able to abandon its entire yard at Escanaba and the saving therefrom, which it was ascertained would be $2,625 per year, will also be divided equally. It will be obvious that the net results of these two transactions, will be practically the same as if the North Western retained all of its savings and the Milwaukee [fol. 177] all of its savings, and each will be benefited by a net amount of $2,653 per year (Rec. 35).

The Milwaukee has a coal dock at Escanaba where it receives lake coal for shipment over its lines. It will retain

its dock and continue to use it and the North Western will handle the traffic for it from Escanaba to Iron Mountain, being reimbursed by the Milwaukee for so doing, for the actual cost thereof, and the Milwaukee will thus retain the revenue and continue its service into Escanaba (Rec. 35).

Each of the railroads interchange traffic with the Escanaba and Lake Superior Railroad. The amount of revenue each company derived from this interchange for the six-year period ending with 1932 has been ascertained and the relation of each to the total has been established. The contract provides that a pool of this revenue will be kept in the future and distributed each year between the parties on the same ratio as was determined for the six-year period, after certain adjustments for loss of ten per cent from the Milwaukee's share and an allowance of thirty per cent of the gross for out of pocket transportation expenses (Rec. 35-36).

The companies will both benefit by the consolidation of tonnage. There will be a reduction in the aggregate amount of trackage, of approximately 22 miles, and the cost of maintenance will be saved. The transportation expense involved will be substantially less, and the cost of equipment, both in amount and in maintenance, will be reduced by reason of opportunity for more intensive use. Each company has had to have sufficient equipment to handle its peak tonnage and hold in reserve equipment that could quickly be transferred from one mine to another as shippers alternated between them. At least 500 less cars will be needed. The cost of maintaining 500 cars can be saved at once. The investment [fol. 178] necessary to replace such a number of cars will be saved when the time would otherwise come for the purchase of new equipment on that account, which would not be many years (Rec. 36).

Obviously, of course, no exact time can be established when these several amounts will be fully attained (Rec. 36-37).

In the future whenever a new mine is opened, each company would have to build to it. As a result of the pooling, only one connection will be necessary, and whatever would be the cost of the other will be saved. The cost of all future mine tracks and mine connections will be divided on the pool per cents (Rec. 37).

No change whatever will be made in the method of serving the mines by either company from what it has been hereto-

fore, excepting that the mines that are now served by both companies would be saved the necessity of alternating their shipments and seeking to divide their tonnage first to one company and then to the other. At the docks the service will be improved in that it will be more feasible to have more commodious docks, and with the traffic all concentrated in one operation the rapidity with which both can be dispatched will be improved (Rec. 37).

[fol. 179] Cross-examination.

By Exam. Stiles:

With reference to the provision of Section 5 paragraph 1 of the Act relative to pooling, which relates to competition, the plan won't have any direct effect on other kinds of traffic (other than ore) because if there are some advantages here in this pooling arrangement, and some economy, why, every other kind of traffic and the railroad and everybody will in some way or other be benefited, but there is nothing to be done here, that will in any way disturb or change the rates or service or methods of handling of other traffic (Rec. 37-38).

The other traffic which is moving over the Escanaba & Lake Superior Railroad belongs to it. The Milwaukee [fol. 180] moves no other traffic over that line except ore. The Escanaba and Lake Superior operates its own railroad, originates and terminates traffic and interchanges at the junction with both the railroads, and now that will continue to go on just as it has in the past so far as we know. Neither of us are breaking off our connections with the Escanaba and Lake Superior or terminating our interchange relations with them (Rec. 38).

The proposed future abandonment of tracks will not affect other traffic. The North Western serves industries at Amasa and Balsam, producing timber products mostly, and has sidetracks at both of those places which are or can be connected with the Milwaukee. They are connected with the Milwaukee, as a matter of fact at both places, and for the present volume, no track changes will be needed so the North Western instead taking some cars from Crystal Falls over this line to Balsam or Amasa with its own engine will turn its cars over to the Milwaukee at Crystal Falls, or possibly Iron Mountain, depending on

where they came from. Then the Milwaukee will take them into Balsam over this brown or yellow line, or both, and place them on the side track at the same place and the same way the North Western would have done if it had taken them there with its own engine. Likewise, when the traffic comes out, it will be handled the same way, it will just be brought out in the same way so that the service, rates and everything will be just as it has been, but it will be handled as traffic of the Milwaukee and bridged out as the Milwaukee. It will be billed as North Western traffic (Rec. 38-39).

There is also a provision in the agreement to permit the North Western itself to handle traffic over these lines of the North Western just mentioned, but we did not expect to employ that with the present volume although we could if we wanted to. Competition for traffic will not be reduced. We will try to get all the traffic the same as we have and so will the Milwaukee and we will both get the traffic and make [fol. 181] the rates. Whatever advantage those people have from two railroads, they will still continue to have, precisely the same as now, if the arrangement is permitted (Rec. 39-40).

By Mr. Burchmore:

I have been assistant to the President, Fred W. Sargent who signed this application as president of the North Western Railway for fifteen years and my duties are executive and supervisory and administrative. As to contact with operating methods and work I get over the divisions each year, sometimes oftener, with the operating department heads about plans they have and I receive daily weekly and monthly reports. My dealing with the daily routine of operating is through the vice president and general manager. Sometimes but not very often I give orders or rulings as to such matters. I do not have as much to do with traffic matters as with operating but occasionally confer with Mr. Beyers and Mr. Miller and so on, about proposed matters. I attended Purdue University, two years, in the course of civil engineering. The president has charge of railroad financial matters and I assist him in whatever he asks me to do in that connection (Rec. 41-42).

I have been personally looking into this matter of pooling of iron ore traffic from the Menominee Range for about

five years. I had heard about the pooling arrangements between the Northern Pacific and the Soo Line at the Cayuna Range and one day I met Mr. Sparrow of the Milwaukee Road and started talking with him to see whether we could work out a plan. That was about five years ago.

The Board of Directors of the North Western considered the matter of this contract which is the subject of the application here and at the February 1935 meeting they approved this precise plan. We submitted it to them for discussion about a year and a half ago, in a general way, but when the plan was worked out as we have it in the contract here under consideration, it was taken to the Board. I went there and explained it to them and they passed a resolution authorizing it at the March 1935 meeting (Rec. 42-43).

The Escanaba, Iron Mountain and Western Railroad Company is leased by the North Western. I am a director of it but not an officer. The Board of Directors of that company took corporate action regarding this matter two or three days after we got back from New York in March (Rec. 43-44).

In 1933, the North Western had the deliberate purpose [fol. 182] and intention of proceeding with this pooling plan. About the same time we were working out a plan with the Wisconsin Central for operation at Ashland which was put into effect after being authorized by the Commission a year ago this month. Prior to putting that one into effect or prior to going to the hearing of the Commission, the ore shippers on the Gogebic Range were visited and the matter discussed with them. We did not take it up with the shippers in the present case. Mr. Miller, freight traffic manager for the Chicago and North Western Railway talked to a good many of them about it. No publicity was given to our plan. We did not consider seriously any other plan of pooling than the general plan of sending all the traffic through Iron Mountain and over the North Western tracks (Rec. 45-46).

We have not filed any applications to authorize the abandonment of those tracks which we contemplate abandoning (Rec. 47).

I am familiar with the contract under which the Milwaukee Road operates between Channing and Escanaba over the Escanaba and Lake Superior Railroad only to the extent of information given me by the Milwaukee people when we were working out this agreement (Rec. 47).

The red line on the map Exhibit No. 2 denotes the North Western tracks over which pooled ore is to be hauled. None will be hauled over the green or violet tracks. The yellow denotes the Milwaukee Road from Amasa through Balsam, Kelso Junction, to the vicinity of Iron Mountain over which Amasa ore is to be hauled to Iron Mountain. Ore from Amasa will be hauled by the Milwaukee by way of Kelso Junction into Iron Mountain. That means all ore from Amasa will be handled that way and the North Western is not to haul any ore from Amasa until after it reaches Iron Mountain. The reason the Milwaukee will handle that tonnage is that it serves only one of the mines and if the North [fol. 183] Western runs up there it would have to run special trains, we do not have any other trains going through there, whereas, the Milwaukee has other train service; it carries other business and puts the few cars that come out of there in those trains. That is, the Milwaukee has other service to and through Amasa, regular daily service going on to Ontonagon, and so forth. While the North Western tracks could be used for anything, there is so little ore business, or any other kind, that it *is* has no scheduled service and has not had for years over that line, so that anything that comes out of there is handled in extra trains run especially for it, and the ore would have to be handled that way (Rec. 48-49).

The Milwaukee will handle this ore from Amasa through Kelso Junction and also through Channing. The routes shown in yellow goes through Channing. The brown line on this map shows tracks of the Milwaukee over which Amasa non-pooled traffic is to be hauled. By non-pooled traffic from Amasa is meant any traffic shipped to or from Amasa under North Western service, other than ore such as hay, poles, ties, lumber or logs. The handling of this traffic is covered by the agreement, but the traffic itself is not pooled. This agreement provides how the miscellaneous traffic from Amasa shall be handled, how the revenues shall be allocated and how the expenses shall be allocated. The handling of it is involved in the pooling arrangement. The revenues will not be distributed but will be retained by the North Western. There is a provision that the North Western will reimburse the Milwaukee for expenses incurred (Rec. 49-50).

The map shows in violet as indicated by the legend "E. & L. S. Line over which trackage is to be discontinued by

C. M. St. P. & P." By that is meant that the Milwaukee Railroad will cease hauling ore from Channing to Escanaba, over the Escanaba and Lake Superior Railroad, as it had heretofore done under its agreement with that Road which [fol. 184] we ordinarily refer to as a trackage rights agreement. We are not doing anything to the Escanaba and Lake Superior Railroad Company. We did not call this matter to their attention (Rec. 51).

The map Exhibit No. 3 shows a point "A" with the language "End of C. M. St. P. & P. trackage rights on E. & L. S. R. R. (Referred to in contract)". The C. M. St. P. & P. trackage is referred to in the contract in several places, but the principal place is where it says that commencing with the ore season in 1935, the Milwaukee Road will cease handling ore over the E. & L. S. (Rec. 51-52).

The contract Exhibit No. 1 does not differ in any important way from the draft of contract, Exhibit A to the application. There are a few changes in verbiage. It has a provision, a clause on it relating to termination and provision for arbitration, which we had not finished drawing up, and there was a little change in it in respect to payment of taxes that was amplified a little in this final draft (Rec. 52).

Mr. Morehouse: The contract form attached to the application stated that map Exhibit A was attached to and made a part of the contract. The map was not completed at that time so it could not be attached. You will note we have referred to it as map which will be attached as Exhibit A. Perhaps one of these maps should be marked as an Exhibit and put in the record (Rec. 53).

[fol. 185] Redirect examination.

By Mr. Morehouse:

The map marked Exhibit A in large letters at the top, identified here as Exhibit No. 4, is a map referred to in the contract as Exhibit A to be attached to and become a part of the contract. It bears the title "Chicago & North Western Ry., Chicago, Milwaukee, St. Paul & Pac. RR., Map of Menominee Iron Range from Loretto to Iron River & Amasa, Mich." It correctly shows the territory within the limitation of this range, starting at the east end at Waucedah, which is referred to in the contract, extending

through the mining territory at Loretto, Vulcan-Norway, Iron Mountain, Antoine. This map shows the towns of Florence and Commonwealth referred to as being places in Wisconsin where there are some mines. It extends through Stager and into Iron River showing Stambaugh and Palatka. It also shows the branch of the North Western running from Stager to Crystal Falls, and the location of the mines and details of the base yards, tracks leading from main tracks to the mines and the little tracks around the mines. It shows in red those that are owned by the North Western, and in yellow those that are owned by the Milwaukee and where there are red and yellow dash lines they are owned jointly by the two companies, and as you will see, many of these tracks are owned jointly. The map also shows the main line of the Milwaukee from Iron River through Crystal Falls and Kelso; the line of the Milwaukee from Kelso to Amasa and in green the line of the North Western from Crystal Falls to Amasa. It shows the track at Amasa, at the Michigan mine, the tracks at the Warner mine and that the North Western does not reach the Warner mine. The mine leads and mine service tracks are shown at Crystal Falls and Alpha. In a general way the map covers the territory defined in the contract as the Range and shows all of the tracks in that territory (Rec. 54-56). (Exhibit No. 4 received in evidence.)

Cross-examination resumed.

[fol. 186] Cross-examination.

By Mr. Burchmore:

The map Exhibit 4 shows in a great deal more detail the same things that are shown on Exhibit No. 2 but there is no intended discrepancy between Exhibit No. 2 and Exhibit No. 4. If there are any conflicts between my oral statement and the agreement Exhibit No. 1, I would want to correct my testimony if I made a mis-statement about the agreement.

By Mr. Burchmore:

Q. Now, if you will turn to the agreement, please, Exhibit No. 1, I observe that on the third page, right after the reference to Exhibit A, the map, is this clause: "2. When and if mining operations in the future are opened up on

the Menominee Iron Range and ore is produced therefrom outside the limits of the 'Range' as herein defined;" now, referring to that language, is that intended to provide for a future course as to mines which may located or open in future months or years outside of the present limits of the Menominee Iron Range or within such limits?

A. Outside the range as defined, but not outside the range of the territory which geologists define as the Menominee Iron Ore Range and which is shown on our Exhibit No. 2.

Q. Where is the difference between the Range as defined in this agreement and the Range as shown on Exhibit No. 2?

A. As shown on Exhibit No. 2, the Range extends to a place west of Watersmeet, and in our agreement we stop it at Iron River. It does not extend any further north much — than we have defined it in our Exhibit and in our contract. On the east, the operating Range we define in our contract stops at Loretto. The actual Range as defined by the geologists extends on east to about ten miles east of that.

Q. Now, in the absence of this agreement becoming effective in the absence of any pooling plan, is it not true that judging by the history of the past and the competitive relations between the Milwaukee and the North Western Railroad, that if a new mining area or new mining group [fol. 187] of mines opened, both of these roads would likely extend their facilities as might be necessary and go after that business in competition with each other?

A. Assuming that it was near the roads of both, I think it likely they would. However, if it was considerable distance west of Iron River and near the North Western and did not produce so very much ore relatively, I would not want to say that the Milwaukee would be likely to extend to it. Of course, neither of them could extend their line beyond the region they reach without authorization from the Commission.

But either road, however, can and have been building spur tracks to the mines without seeking authority from the Commission and if a mine could be reached by spur tracks by either or both of them, it is likely that both would go to it. Some of these spurs to mines are six and seven miles long in this territory (Rec. 59-60).

Paragraph 5 of the agreement, Exhibit No. 1, starts out by saying, "Revenues on non-pool traffic, handled one for the other,". The term non-pool traffic refers to traffic that

we are not seeking to have authority to pool the revenue of, and the traffic itself consists of these products mentioned that have heretofore and would continue to move out of Amasa and Balsam over the North Western and into Amasa and Balsam over the North Western, and at Escanaba, the coal that the Milwaukee Road handles from its coal dock in that place; nothing else. The term really refers to commodities other than ore (Rec. 60).

It is intended to provide by Paragraph 6 of Exhibit No. 1, dealing with road haul, that the only road haul the Milwaukee is to perform in the future on ore will be from Amasa to Iron Mountain. We have considered what will become of the crews that handled these road trains that now run over the Milwaukee Road elsewhere than between [fol. 188] Amasa and Iron Mountain. What will become of them depends on what they want to do. I do not know what they want to do. There may be work for them in connection with ore. We are willing that these crews shall be taken over by the North Western but we have not arranged it. The North Western is willing to let any men who have the right to work in the crews any place in this pooling arrangement. The pooling arrangement will reduce the amount of man hours, we hope to some extent, we don't know just how much. That will be largely by the elimination of idle time, wasted time, deadhead time and features of that sort, more than it will actual time paid for and work (Rec. 61-62).

Paragraph 11 of the contract, Exhibit No. 1, contains the clause "And provided, further, that in no event shall less than 88.9 per cent (the relation of the Menominee Range ore to the total ore handled over the docks at Escanaba in the period 1923-1932, inclusive) of the available capacity of the dock be utilized for pooled ore." This is to assure the Milwaukee that their part of this ore will get as good an opportunity to go through the dock in time of emergency as any of the North Western ore. The Marquette Iron Ore Range is a separate and distinct range from the Menominee. Both ranges are active shippers and the North Western Docks at Escanaba are to some extent used for Marquette ore, while the Milwaukee docks at Escanaba are used entirely for Menominee ore. Under the contract we bind ourselves so that in time of stress and great movement of tonnage, we guarantee that the Menomi-

nee ore shall enjoy 89 per cent of the Escanaba docks capacity regardless of what Marquette wants or may be entitled to. That may not be regarded as a limitation of competition. It is not true that there have been periods in the past ten years when the total capacity of the docks at Escanaba was not sufficient to take care of promptly all the business. It may be so that there have been times in the last ten years when boats had to wait, could not get up there to get their cargo, but that does not follow what you said just before this (regarding limitation of competition). The docks as used always had sufficient capacity to satisfy the demands of boats and ore shippers in the movement of traffic. As to how I explain the circumstances that boats did wait and grumbled and complained and telegraphed—there is something else about the situation up there that created the delay, but it was not the incapacity of the docks. It was not necessarily the incapacity of the docks to perform the desired service. I cannot explain the reason for the delay (Rec. 62-64).

We will of course always have to provide capacity for [fol. 189] both ranges in these docks. Consequently, we will always have room there for all the ore that both of these ranges can produce, unless an emergency arises, a strike or a fire or something of that sort that incapacitiates us, [fol. 190] in which case we assume the shippers of the Marquette and Menominee Ranges will both have the same relative rights to get as much of their business through here as they can, and therefore we will treat them all alike and put as much, as nearly as we can, a pro rata share of everybody's business through these docks. That won't be in restraint of trade. We will just treat them all alike.

Examiner Stiles:

Q. Does not this clause bind you in a way so that you could not treat them all alike?

A. No sir.

Q. And live up to the provisions of the paragraph?

A. It binds us to treat them alike, pro rata. He (Mr. Burchmore) is thinking only of somebody at Marquette wanting to ship, but there will always be somebody at Menominee wanting to ship, too, and they will both want the dock and each of them will get a share of it.

Q. Well, doesn't this reserve practically 89 per cent of the facilities there to the Menominee Range?

A. To the Menominee Range, yes, sir, and that is the way they are built. They are built that way. The contract also provides that. Of course, if there is any permanent change in the relationship in the pooled and non-pooled ore, then, the percentages would have to be changed and in that case, something would have to be done to make that change, but that is something of a permanent nature and not an emergency which would arise just through a casualty or something of that sort.

Q. And even in the light of what Mr. Burchmore referred to, you see no necessity or desirability for changing the terms of Paragraph 11?

A. That does not prejudice Marquette shippers. As I see it, it protects them. It does not prejudice Menominee shippers. It protects them. It puts all people who would [fol. 191] want to use this dock on a parity with each other in case of an emergency, the shippers and the two railroads.

By Mr. Burchmore:

Q. It does not do anything to the Marquette shippers that it does not do to the Menominee shipper? The Menominee shipper today has two railroads, he can patronize one or the other for his ore, but after this goes into effect, if the Menominee shipper wants to use one railroad, if he wants to ship by rail, he has to use just one railroad and no matter what the desires of the public may be, the two railroads divide the revenues between them, 34 and 66, isn't that true?

A. Yes, sir (Rec. 64-66).

The sentence on page 14, paragraph 27 of Exhibit No. 1 "The use by either party of the pooled trackage and facilities, including the main line of the Milwaukee between Amasa and Crystal Falls, shall also be permitted in the handling of the non-pooled traffic to and from territory now reached and served by tracks and facilities which either party shall have abandoned pursuant to this agreement." This is intended to guarantee to each of us that we will not be cut off from reaching some place we can now reach when we take up a track, for handling ore, which is no longer needed after the pool is formed. The main line of the Milwaukee between Amasa and Crystal Falls is specially mentioned because, excepting for that piece of main line, it relates to spurs and sidings and other trackage in

the area here. This clause is not really a joker against the Milwaukee. I do not think it would seriously affect the arrangement if that sentence were stricken out, but it might leave some ambiguity, if left out and it is put in just as a declaration, rather, of intention and purpose and rights (Rec. 67-68).

This sentence introduces into the whole arrangement a definite provision for the future handling of non-pooled [fol. 192] traffic. For example, there may be a saw-mill say at Iron River in the vicinity of one of the mines the Milwaukee now reaches. The Milwaukee gets this traffic by coming in over their connection out of base yard. That connection will be torn up as it is no longer needed for handling pooled ore, but the Milwaukee still wants to get that saw-mill traffic. The statement in the agreement then, permits them to reach the mill over pool facilities just as if the connection they owned had not been removed, and vice versa, if they serve a place where we have a mill and we want to reach it and take up our track, we can go around through this system of pooled tracks, regardless of ownership or other obstacles.

The only presence of main tracks is from Amasa into Crystal Falls, and we mention that because we thought it was of sufficient importance to specify. This sentence occurring as it does in the middle of Paragraph 27, refers to pooled trackage. It is necessary to read this contract to understand what the pooled trackage is. It is whatever is defined in the contract, not everything shown on the map. The map Exhibit No. 2 says red means C. & N. W. tracks over which pooled ore is to be hauled. That is not pooled trackage; that is the trackage over which pooled traffic is to be handled, but it is not the same as pooled trackage. The sentence referred to is not unfortunate but consistent with the definition in this; neither we or the Milwaukee have any misapprehension about it or any inability to understand it but I think it is perfectly clear. Paragraph- 26 and 27 define pooled trackage. Now, if anything is not embraced in this definition, it is not pooled trackage. Exhibit No. 2 does not define what is pooled trackage and what is not (Rec. 71-72).

To point out on the big map, Exhibit 4, the pooled trackage, starting at the east end (indicating) pooled trackage is all that trackage leading out to this mine; starting in

at the east end near Sturgeon, the branch spur leading to the Loretto Mine and all those branches at the mine is pooled trackage. At Vulcan, all the trackage leading to the [fol. 193] Vulcan Mine is pooled trackage, and at Norway, the trackage leading to the Norway Mine, Briar Hill Mine, West Vulcan Mine and Diana Mine is pooled trackage. Now that illustrates what you asked me to do. Today the Milwaukee has no mine run tracks coming anywhere near the spurs at Vulcan and Norway, those spurs connect only with the North Western (Rec. 72-73).

By Mr. Burchmore:

Q. And in the future, if this arrangement takes effect, the ore will be taken from those mines over those tracks, and then over the North Western main line, and a hundred per cent by North Western men and crews and mode of power?

A. No, sir, not necessarily. I don't know——

Q. Well, you are not going to have the Milwaukee running over this railroad?

A. No. The Northwestern Railway will handle this ore, but you said the North Western men. Now, I don't know about that (Rec. 73).

The mines at Vulcan and Norway are put into the pool just exactly as the mines at Amasa, and the Carpenter Mine, the Dunn Mine, the Davidson Mine, and all the rest of the mines on the ore range. The revenues from the ore produced at these spur tracks in this section at Vulcan will be divided 66 and 34.

Paragraph 27 is only intended to give the Milwaukee a right to 34 per cent of the money in connection with this spur track at Vulcan and the spur track at Norway; but Paragraph 27 says the use by either party of pooled trackage shall also be permitted in the handling of non-pooled traffic to and from the territory now reached and served, by tracks which either party shall have abandoned, and that is the meat of that whole definition. They do not reach Norway, and won't have abandoned anything so it won't give them any right there, but up in the other places where they had a track and could reach it and abandon it, and where it was reached before, they retain the right to still go up there, as at present under the pool (Rec. 73-74).

The main line of the Milwaukee from Crystal Falls to Kelso Junction, colored brown on Exhibit No. 2 and the

main line of the Milwaukee from Amasa through Kelso Junction and Channing to Iron Mountain colored yellow on Exhibit No. 2 is not pooled trackage within that definition, [fol. 194] but the side tracks up there at Balsam and Amasa are pooled trackage (Rec. 74-75).

The line of the North Western from Iron River through Scott Lake and Stager, colored red on Exhibit 2, is not pooled trackage. I don't know whether the line in red from Stager to Crystal Falls is pooled trackage. That will depend on how the Milwaukee—what industries they have in the vicinity of the Dunn and Alpha Mines that they could reach and how they would have to go to reach them. If they had to come down from Crystal Falls over the main line to get there, because their connection had been cut off, then, they could come in there, although the definition would not state it as being pooled trackage (Rec. 75).

The line colored brown on Exhibit 2 from Crystal Falls to Kelso Junction is not pooled trackage.

By Examiner Stiles:

Q. Mr. Hand, you have just answered to Mr. Burchmore that the line shown on Exhibit No. 2 in yellow is not pooled trackage. How does that answer accord with the statement which Mr. Burchmore read from Paragraph 27, which says, "The use by either party of the pooled trackage and facilities, including the main line of the Milwaukee, between Amasa and Crystal Falls"?

A. Well, he did not read that, he did not describe that piece of track.

Mr. Burchmore: That is just what I read, exactly.

The Witness: That piece of track is not pooled trackage, but this paragraph gives the North Western the right to use it, even though it is not pooled trackage, for the purpose of getting back and forth with this non-pooled traffic.

By Examiner Stiles:

Q. Well, when you say "pooled trackage", including certain things, isn't the ordinary sense of those words that the thing described is being included as pooled trackage?

A. No, that is not what — word- refers to. The wording means being used by either party, by the main line of the [fol. 195] Milwaukee between Amasa and Crystal Falls, it

includes it within that group which either party has a right to use to get to non-pooled traffic that had been cut off, that they had been cut off from by reason of something being abandoned and taken up.

Q. Then, you say "the expenses, including the main line of the Milwaukee between Amasa and Crystal Falls", modifies use and not pooled trackage?

A. Yes. You see, there would not have been any purpose of putting it in here, if that had been pooled traffic, pooled trackage. Then you can't say the use of pooled trackage would have been granted, and then would not have been any necessity for specifying this main track, in order to include that. It would have been included automatically.

Q. So, the Milwaukee opens up to you a part of their main line but you do not open up to them any of your main line?

A. That is right (Rec. 76-77).

Paragraph 35 of page 17 of Exhibit 1 refers to a joint survey to be made as soon as practicable of the road trackage and facilities incident thereto of each party needed to be used for the movement of, first, pooled ore, and second, pooled or non-pooled freight traffic, and in the third and fourth subdivisions refers to non-pooled freight. The latter reference is any traffic, any freight traffic moving over tracks over which pooled traffic would be moved. It refers of course, starting off with that traffic coming from Amasa and Balsam by North Western. It refers to coal that the Milwaukee may want moved in and out of Escanaba, and any other freight traffic where any of it is moved over these facilities. That survey should cover all of that part of the two railroads colored in red and yellow and brown on Exhibit No. 2 and certain spurs connecting therewith and also that colored in brown. The survey would cover all facilities to be used in any way by the arrangement. The designation A, B and C are just classes into which the survey [fol. 196] will separate the different trackage and that is for the purpose of getting a workable scheme here for separating and allocating expenses, and so forth. Section 35 does not relate only to pooled trackage. It relates to all trackage used, whether pooled or non-pooled within the limits of the Iron Range (Rec. 78-79).

The first sentence in Paragraph 37 reading "the switching of the pooled ore business at Amasa and elsewhere on

the Range shall be pooled" does not mean that the only switching the Milwaukee will be allowed to do is that at Amasa but that the performance of switching will all be pooled. It will be performed for the benefit of this pool. There won't be any individuality here by these two companies and at Amasa it will in a sense be supervised and managed by the Milwaukee Road. That elsewhere will be supervised and managed by the North Western but it does not make any difference where it is, or who manages it. It is all pooled just the same and the expense of it is apportioned according to the pool percentages. That sentence is to define what is to be divided under the pool percentages (Rec. 79-80).

Paragraph 37 provides that the Milwaukee shall furnish power and crews for and shall perform all such switching throughout each ore shipping season at the mines at Amasa. Paragraph 38 provides that the Milwaukee shall furnish train and engine men and perform the road haul of pooled ore and North Western non-pooled business between the Amasa district and Iron Mountain and Crystal Falls and under Paragraph 37 and 38 the North Western will furnish power and crews and perform all other switching and all other road haul. That does not relegate the Milwaukee to a minor position. What that means is that it will be the business of the superintendent of the Milwaukee to get out the trains and run them over this part of the territory that is assigned to them. It will be the business of the [fol. 197] superintendent of the North Western to get out the crews and run them over the other part. Another paragraph deals with superintendents but that is what this means too. The superintendents salary is not there, that is another subject under expenses (Rec. 81-82).

This contract sets forth all the things that both these roads are agreed to do. In the sentence in Paragraph 51 reading "The Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba & Lake Superior Railroad" means that the Milwaukee unequivocably agrees to do that and the North Western agrees, subject to the approval of the Interstate Commerce Commission, to discontinue and abandon its Amasa Line. That is all we are going to abandon, but it is not all we are going to do, of course. The main thing we do here is to agree to let the Milwaukee have a way to get its ore out after it obtains it from this other route.

The figures following the language "it is agreed that during the ten years ending with 1932, these roads incurred average annual expenditures, as follows, which will hereafter be saved" represent the main items of savings to which I referred in my testimony (Rec. 83).

In Paragraph 51 appears the language "should the Milwaukee discontinue the use of the line of the Escanaba and Lake Superior Railroad, it is obligated under the provisions of the contract to continue these payments * * * from the date the Milwaukee is relieved of making these payments, or any part thereof, it shall pay annually to the North Western one-half the amount or amounts by which it is relieved of minimum rental payment during the life of this agreement" that means that we will get half of whatever they save. They won't save this $27,180.00. They will have to pay this money to the Escanaba and Lake Superior whether or not they use it, but when they get through paying that, they have agreed to give us half of it. The [fol. 198] contract between the Escanaba and Lake Superior and the Milwaukee terminates in 1951 (Rec. 84-85).

Paragraph 52 of the agreement says "by reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad if this arrangement were not put into effect", and it is assumed "that the North Western will gain some part or all of said revenue if this arrangement is put into effect". If the North Western gains this revenue it will be because the traffic which has moved over the Milwaukee in connection with the Escanaba and Lake Superior Railroad will thereafter move over the North Western in connection with the Escanaba and Lake Superior Railroad. That just means that if the interchange now made through Channing shifts over to the North Western through to Escanaba, then, the revenue that the Milwaukee formerly got will be earned by the North Western. The Escanaba and Lake Superior Railroad, however, will earn precisely the same amount under the latter arrangement as it did under the former, so that the Escanaba and Lake Superior Railroad loses nothing nor gains anything, but the Milwaukee loses something and the North Western gains it (Rec. 86-87).

It is assumed that a shift in the traffic may occur because if the Escanaba and Lake Superior, for instance, has a

shipment to Milwaukee and they send it out to Channing and it goes down through the Milwaukee route to Milwaukee, it is divided with the Milwaukee at Channing. If they want to, they can give that to the North Western at Escanaba and get just as much money for themselves as [fol. 199] they got from the Milwaukee. Then, the North Western would handle it to Milwaukee and we would get the money that the Milwaukee used to get, and that is all that would happen. That provision was put in at the behest of the Milwaukee Road (Rec. 87-88).

We agreed in the clause "It is, therefore, agreed that from the effective date of this contract, the revenues of the two companies from all business interchanged with the Escanaba & Lake Superior shall be pooled." That isn't anything I should think the Escanaba & Lake Superior or the shippers would care anything about at all, so their concurrence or views were not sought. I can't imagine why they would or should object to that (Rec. 88).

Paragraph 53 was incorporated to save the Milwaukee from losing all the business that would be lost to them if the North Western acquired the Escanaba & Lake Superior Railroad and therefore had no interchange with it because it was all one system. The Escanaba & Lake Superior was allocated to the Milwaukee in the Commission's Plan of Consolidation. The North Western has no ambitions to acquire the Escanaba & Lake Superior at the present time, but this provision provides what will happen if that should occur. It was put in to protect the Milwaukee so that we could not by buying that railroad cease to be obligated to pay them this percentage of interchange (Rec. 89).

In Paragraph 54, we provide that if the North Western should acquire the terminals of the Escanaba & Lake Superior the divisions thereafter would be subject to percentage arbitration. We are willing to agree with the Milwaukee that if we bought the Escanaba & Lake Superior we would still give them the benefit of the earnings they could get if they stayed there, but if some Commission compelled us to take it we would not know what the situation would be and all we could do then would be to say we would have it arbitrated. It may never happen, of course (Rec. 89-90).

Paragraph 55, in Exhibit 1, is new and is not found in the contract as annexed to the application. There are now a number of industries in Escanaba on the North Western

to which the Escanaba & Lake Superior extends its service on a reciprocal switching arrangement. There are some industries on the Escanaba & Lake Superior to which the North Western has extended reciprocal switching arrange-
[fol. 200] ments. That traffic is not interchanged and yet the Milwaukee gets the benefit of some of it, and this paragraph reserves to them the continued right to have a chance to get into these industries in the future, if they find they need it, by establishing joint rates through Iron Mountain and over the North Western, and the purpose is to make sure that none of these industries in Escanaba having this privilege and service would be jeopardized or hurt by this arrangement. This is an arrangement to join in establishing through *through* rates and divisions. It won't have any effect on the Escanaba & Lake Superior. It is there to enable the Milwaukee, if there is any reason for it, to serve in Escanaba some industries now on the North Western tracks, but can get service through the channel end of the Milwaukee and the Escanaba & Lake Superior and then over to that industry on the North Western on the reciprocal switching charge. If an industry in Escanaba wishes to obtain coal, or any other product, from some place on the Milwaukee, they can, at present, get such products through to Escanaba and into their industry, and this provision enables the Milwaukee to solicit the freight and serve the industry. Now, if the Escanaba & Lake Superior and the Milwaukee are still friendly, they will still continue to go on that way and it will go down on that reciprocal rate, but, if the Escanaba & Lake Superior decide they won't do further business with the Milwaukee, then the Milwaukee would be out of it unless we had agreed with them to let them come in over our lines in the same way, to the same industry, on the same rate. That is a little protection there for the Milwaukee against such a possibility and it continues the industry in the same relation as it has always been in. It takes in the Milwaukee and the shipper of that product who may be off in Indiana or elsewhere. The Escanaba & Lake Superior does not necessarily lose this business. They can keep it. They can still use the same route, but if anything happens to cut off that route the provision leaves another way to get the business in other hands at precisely the same rate and with the same service to the industry. Of course, there is a line of tariffs published that show all these things (Rec. 90-93).

Today there is a through rate on coal from Illinois mines by way of the Milwaukee, north through Iron Mountain to Channing, and then over the Escanaba & Lake Superior Railroad to Escanaba. Assuming a through rate via that route, the North Western has nothing to do with that par- [fol. 201] ticular shipment. Over some other rails and other routes the North Western is a party to through rates on coal from Illinois to Escanaba, so that today the consignee at Escanaba enjoys the advantage of two routes. Under paragraph 55, the North Western agrees to join with the Milwaukee in a through rate and division, having nothing to do with Channing and the Escanaba & Lake Superior Railroad, but would open a new route, Milwaukee Road to Iron Mountain, and then North Western to Escanaba, and the agreement is that the North Western will do this when the Milwaukee desires (Rec. 94-95).

If such arrangement is made "all traffic interchanged at Iron Mountain shall be included in the foregoing pool, the same as traffic interchanged at Channing." If that occurred, the consignee at Escanaba would have two routes, one via the North Western all the way to Escanaba, and the other via the Milwaukee to Iron Mountain and North Western into Escanaba. There is nothing in that which could possibly be to the advantage of the Escanaba & Lake Superior Railroad. As to whether it is very decidedly possible to be of great disadvantage to the Escanaba & Lake Superior, namely, by cutting it out of all the business, I don't see why they would want to do that, unless the Escanaba & Lake Superior Railroad first refused to handle the business the way it is now moving. There would be no need of putting it through Iron Mountain unless the Escanaba & Lake Superior refused to carry it from Channing (Rec. 95-96).

The Milwaukee Railroad gets into Escanaba today only through the medium of the Escanaba & Lake Superior Railroad.

Q. If this pooling arrangement takes effect, the Milwaukee Road will not itself haul any ore into or out of Escanaba; it will all be hauled by the North Western.

A. It will all be hauled in the pools jointly by the two companies under this pool arrangement.

Q. But it will go in over the tracks of the North Western Railroad?

A. Yes, that is right.

Q. Now, is it your thought that the Milwaukee Railroad [fol. 202] will then, notwithstanding its change as to ore, continue to haul all other traffic into and out of Escanaba through the medium of the Escanaba & Lake Superior Railroad as it does today?

A. They do not haul any other traffic into and out of Escanaba through the medium of the Escanaba & Lake Superior excepting this little coal. All the rest of it is interchanged at Channing.

Q. Then, does the Milwaukee Railroad have any terminals at Escanaba at all, in connection with the ore and coal?

A. Ore and coal, ex-lake coal.

Q. It has not at Escanaba?

A. Not directly, no.

Q. And you propose by this agreement to pool its ore?

A. Yes, sir. (Rec. 96-97.)

By Mr. Burchmore:

Q. Would the North Western be perfectly willing to strike out Paragraph 55 from this agreement?

A. This is a part, of course, of the arrangement that appeared to us when we were doing this and drafting this contract and even as late as this revision, to be something that should be in there so that there would be every eventuality [fol. 203] that we can think of that might occur, we would have a provision for it. Now, I think that you should leave it in because there is a possibility of certain eventualities that would be taken care of definitely according to this, if you leave it in. If you left it out, why, then when it arose, we would have to consider it and do something about it, then, I suppose, on its merits, then, at that time, if you did not have any provision for it (Rec. 97).

Paragraphs 69 to 78, both inclusive, are almost entirely related to matters of liability and settlement as between the companies and merely incidental to the main purposes. These are the standard liability, termination and arbitration clauses used in many contracts. They were not included in the original draft (Rec. 97-98).

The contract being for 99 years, is a little longer than necessary in view of the observation that the ore deposits have a life of perhaps 50 years. That is a little margin of safety. The agreement provides "that the Milwaukee shall

have the right, upon permanent withdrawal from the ore business on the Menominee Range, to terminate the agreement." That condition was exacted because of the investment that we will have here which would be left on our hands with nothing to do with it.

By Mr. Burchmore:

Q. Well, you have a further provision, however, that the North Western must be protected in its investment in the docks?

A. Yes, but that is not all, of course.

Q. And the only investment that you would have other than in the docks is that investment which you now have in your individual lines?

A. Well, I just think it is good business, of course, if you go into an agreement with somebody to have something definitely understood about how you are going to keep it up and not let them change horses whenever they felt like it (Rec. 98-99).

As to the division of this business on a 66 and 34 per cent basis, the proportion of the ore tonnage as between the two carriers in 1934 was practically fifty-fifty. Even though the Milwaukee Road was right on its toes and went after the business by giving splendid service and attracting shippers [fol. 204] to its lines, it is not possible that the Milwaukee could get better than 50 per cent of the ore instead of 34 per cent in the next ten years. We know that we could hold our own to the extent of two to one against the Milwaukee in competition. The reason they got 50 per cent in 1934 is because there were a lot of stock piles in certain places that they cleaned up that year. It had been lying there, and it was not ore mined that year at all (Rec. 99-100).

The Bates Mine at Iron River shipped 74,000 tons via the North Western and 73,000 tons via the Milwaukee in 1934. They are joint mines. At joint mines—mines served by both roads—the division is approximately fifty-fifty. The Milwaukee does not get 50 per cent of all the ore since many mines on the North Western are not joint. They don't reach the mines at Stambaugh and Norway at all, and those mines will continue to produce, and as long as they continue there will be no chance for the Milwaukee to get 50 per cent over a long period of years. In an unusual year, such as the last, they could get 50 per cent but could not do so over a long period of time (Rec. 100-101).

There is no reason to expect that in years to come the Bates Mine, served by the two railroads, should be expected to give the North Western 66 per cent and the Milwaukee 34 per cent of its business. They will continue to give it business, and, assuming the division will be what it has been in the past, fifty-fifty, they would continue to get just as good a break there as we did. The agreement provides for a pool operation of course, but the effect of it is to perpetuate joint line service to that whole region by having two parties participate in it on a perpetual basis (Rec. 101, 102).

Q. I notice the Hiawatha mine figure is 60,000 over the North Western and 92,000 over the Milwaukee. Why do you suppose they gave the Milwaukee so much more than you last year?

A. I don't happen to know.

Q. It might have been better service?

A. I don't think so. The service is alike, but it was probably some good reason. There is somebody here that can probably tell you why.

Q. Do you know why the Monongahela mine gave 23,000 tons to the North Western and 48,000 tons to the Milwaukee, last year?

I would not say. We can tell you, though, by people who have worked up there and are familiar with the business there every day (Rec. 102).

The application states that the public will have better service; they have had excellent service in the past. I have heard that it would be a convenience to them (shippers) to have one set of cars and one switch operation and everything coordinated so that they did not have to change back from one to the other. Now the arrangement here at these jointly [fol. 205] served mines, for them to start out and give some of their ore for a while to one road and then give it to the other for a time and then go back—those transfers back and forth are an inconvenience and when it gets to the dock, they have difficulty perhaps in cleaning up the dock and getting the cargo made of the last ore that went out over one of our lines, so they partly fill the boat and clean it up and then they have to go over to the dock and get the fill out there and that will all be obviated because it will all go through one place (Rec. 102, 103).

These things necessitate a longer time to build up cargoes and they have to pay more detention and storage charges because of that and there are a lot of things about this to benefit the public. We have a similar pooling arrangement at Ashland. It has been in effect a year and the shippers like it. It has been beneficial. We can all see it (Rec. 103, 104).

Q. Now, as to service, I understood you to say that there would be no change in the method of serving the individual mines by either company from what it has been, from what has been the method in the past?

A. Yes, that is what I said (Rec. 104).

On the average the ore would get to Escanaba quicker than it is today, although today the service is pretty fast. Some of the ore of course does not get down the day it is loaded up and under the plan a bigger percentage probably of the cars loaded every day would be loaded into the docks the same day.

By Mr. Burchmore:

Q. Just to ask you your expression on this question: In your position as assistant president of the North Western Railway, don't you think as a matter of human experience and human nature and ordinary railroad conditions that where there are two railroads serving a shipper or a community, rivals for the revenue from that business, the service is apt to be better, decidedly better than where one railroad enjoys in a *a* sense a monopoly and there is no incentive to do well?

A. That may be so in some cases and perhaps in lot of cases, but it would not be here where it is just this one commodity and these few companies that are concerned, and this one thing, and it is all regular and that is all imaginary.

Q. Yes.

[fol. 206] A. (Continuing.) —if you think that that has any—would make a particle of difference with it.

Q. Supposing I had a mine in the Crystal Falls section and I was shipping over the North Western and the North Western was giving me very unsatisfactory service, I could try the Milwaukee and see if theirs would be best under existing conditions, couldn't I?

A. Of course, that situation never arises.

Q. Well, I don't know about that, but supposing there was

only the one carrier available as this pooling arrangement will make—supposing the North Western in serving my mine at Crystal Falls gives me terrible service next year and this pooling arrangement is in effect and I go and complain about it, what incentive is there for the North Western to give me any better service; you know you got 66 per cent of my money, anyway.

A. That is wrong, to consider that as soon as we get this through, we are going to treat all these people rotten. You know we are not going to do anything like that. We are going to continue to serve them as best we can. That is our obligation, and the Commision would see to it if we did not.

Q. I think it is, perhaps, but, I say, where there is no competition of a concern in any line, the customer is not anywhere near in the position as where you have two.

A. I do not think that is so very much anymore. We have a case up here at Kenosha, the fine town of Kenosha, there is only one railroad in that town and it is the North Western, and yet there are fine industries there; they get excellent service and they never complain about it, and we have even leaned over backwards to see to it that they continue to get good service, because they only have one railroad. We are more concerned about them than we are about the industries in Racine, where there are two railroads.

Q. You do not know how much business the North Shore Electric had been getting since they started freight service into Kenosha?

[fol. 207] A. Oh, yes, but it is not shipping a great amount.

Q. That is because they give so much better service on short hauls than the North Western?

A. They give you a different kind of service. Trucks go in there and take business on something we cannot do. We can't help that (Rec. 104-107).

I would not say that either the North Western or Milwaukee initiated the movements that have resulted in the proposed pooling plan. The matter of joint arrangements, of course, started a long time ago; way back in 1912 we began to switch jointly around a number of mines. We started figuring on this particular plan around 1930 but did not go very far with it at that time. Each was probably as much concerned about — as the other. I think perhaps the Milwaukee did develop this final plan first but it was all

after we had discussed it back and forth two or three different times and had considered it two or three different ways. They happened to have more men available so they worked up the figures (Rec. 107-108).

As was stated the contract has been executed by the North Western. The Milwaukee will execute it tomorrow (Rec. 108).

Cross examination,

By Mr. Hook:

The Milwaukee and North Western each have two ore docks at Escanaba, making four between the two lines. The Milwaukee's docks are worn out. I have been told that and have seen them. They have not used one for several years and the other was not used until last year and they did a lot of repair work on it (Rec. 108-109).

One of the North Western docks was built in 1891 and the other in 1905. The older was practically rebuilt in 1910 and heavily repaired two years ago. The one built in 1905 was repaired in 1925 so the oldest, No. 5 was completely rehabilitated in 1910, and No. 6 in 1925. A complete rebuilding is practically the same as building a new dock (Rec. 109).

I think the Milwaukee's docks were built between 1901 and [fol. 208] 1905 but were built along different lines and have not had the repairs that ours had. They have precisely the same sort of docks there as they had when they were first built. They have been repaired by just replacing parts. Our docks are different in many details from the way they were originally built in that they have been modernized; they were all torn down to the water and a new structure put up in place. In rebuilding they were somewhat improved. The slopes of the pockets were changed as were also the pocket openings and No. 6 was equipped with electrical hoists for handling the spouts and the hinge holes or line of the bottom pocket was changed slightly. These changes improved the capacity for handling ore (Rec. 109-111).

The Milwaukee and North Western docks are built on somewhat different plans and the pocket sizes are different. The North Western pockets hold 250 tons, five 50 ton cars. I do not know the exact capacity of the Milwaukee's pockets but some of them are 200 tons (Rec. 111-112).

The foundation of North Western Dock No. 5 is a little older than the Milwaukee's and the foundation of No. 6 is about the same age as theirs whereas the Milwaukee has kept its docks repaired up to the last few years but they never rebuilt in their entirety but repaired them each year as they had to to carry on. I do not think that was looking towards this pooling agreement (Rec. 112-113).

The Milwaukee docks are at the point now where they can never be repaired in the way they have been. They would have to go to the water, tear them down and build new docks. They were operating them last year but had only a half million tons of ore and spent a lot of money repairing them in order to handle it (Rec. 113-114).

In the last four years the ore business in northern Michigan has only averaged about one fifth as much as it did for the ten years prior to that. In normal times the North Western docks at Escanaba have taken care of almost six [fol. 209] million tons in one year. 1916 was the biggest year we ever had but 1929 was over five million tons (Rec. 114-115).

From a geological standpoint there is still a great amount of ore in the Menominee Range district, practically as much as the Gogebic district. There is at least as much more as has been taken out, way above 100,000,000 tons (Rec. 115).

The Milwaukee Road also has a line from Channing to Ontonagaon. I do not think the pooling will cause that line to be abandoned. That is highly improbable. I have heard about the suggestion and do not think that this would make any difference, because whether it would go or not does not depend upon this pooling arrangement. Such abandonment has not been discussed by our Board of Directors (Rec. 116).

Q. The Escanaba & Lake Superior Road depends a great deal on the contract that they have with the North Western?

A. You perhaps mean the Milwaukee?

Q. Or the Milwaukee. Pardon me.

A. Well, of course, I don't know how much they depend upon that. I am not connected with the Escanaba & Lake Superior Railroad nor the Milwaukee. It was built there quite a while ago.

Q. Then, you are not in a position to say whether or not this pooling agreement would cause the practical abandonment of that road?

A. Of the Escanaba & Lake Superior?

Q. Yes.

A. All I know is that they have had a business—other business of as high as $450,000.00 a year, and down maybe last year to $200,000.00 or $250,000.00. That is the amount of their other business, and I should think that a road doing that much business, they paid dividends right along, most every year, a road that is doing well, getting along that [fol. 210] well, certainly it would be highly improbable that this particular thing alone would destroy them, if they lost it.

Q. Did you arrive at those figures that you just mentioned through a study of this pooling agreement?

A. No. Their annual reports. Of course, we see their annual reports that they make, they make them to the Interstate Commerce Commission, and they are published, and we get it that way. It is all public information, what they make and what the expenses are.

Q. Their return to the Interstate Commerce Commission includes their business on the iron ore?

A. Yes.

Q. So that you don't know what amount of business they would do separate from the iron ore?

A. Yes.

Q. How much would that be?

A. Well, they got around $41,000.00 a year rent from the Milwaukee.

Q. Well, that will be eliminated under this pool agreement.

A. No. Only 17,000 or 16,000. The Milwaukee will still pay them the 27,000 for nothing. They won't lose that.

Q. I understood you to say, Mr. Hand, when you gave those figures a little bit ago of the revenues, that that was revenue other than ore tonnage.

A. Yes. Their income from the rental is not shown in railway revenue. It is shown in other income. What I was giving him was the revenue from the business that the Escanaba & Lake Superior Railroad does and collects in those revenues and in those accounts, credits to the revenue accounts, as classified by the Commission, that there has been from 200 to $400,000.00 a year, and more than 400,000 in 1929, 450,000 I think it was. So that there is a relation between this rental and their other business. The rental is

40,000, or 41 or 42,000. Of course, it rises and falls, but that is what it averages during this ten years, and only 16 or 17,000 of that they stand to lose. They will still have the other 200 to 400,000 dollars that won't be affected, that they get from local business and business of interchange with the North Western and the Soo Line and the Milwaukee, [fol. 211] all three. They have large industries on their railroad and they are performing this service, switching service, originating and terminating their freight (Rec. 117-119).

The North Western can haul about a ten thousand gross ton train, over its road but the size of its trains is generally limited to about 90 cars. The North Western doesn't want to handle more than 90 cars at a time. The limit is by length of train rather than tonnage. The North Western generally runs about a 90 car train, but of course that is the maximum. Ordinarily the North Western does not get such trains because it has to start them before that much tonnage is made up (Rec. 119-120).

The Escanaba & Lake Superior has good rails and good ties but no better than the North Western. Its road bed is not as good as the North Western but has a potential capacity of a little more tonnage from Channing to Escanaba. If the Escanaba & Lake Superior ever got a chance it could occasionally haul a few more cars than the North Western. You can figure out on paper how they could carry a few more cars but in a practical way there is no difference. If they got them into Escanaba they would have to cut and double back, and we do not, so we can get this much tonnage over the road in as little time as over that road (Rec. 120).

I have not made a survey as to the number of people employed by the Escanaba & Lake Superior. There are a good many people in the towns immediately adjacent to Escanaba, Wells and Groos. There may be 7000 and there are some in the country. It is not a thickly settled country, of course (Rec. 121).

I understand that Channing, under the pooling, will still be a terminal and a place where the Milwaukee would interchange with the Escanaba & Lake Superior and they have other business there besides the ore business (Rec. 121-122).

[fol. 212] Redirect examination.

By Mr. Morehouse:

Considering grades and the necessity for doubling at certain places and the location of the mines tonnage can be handled as well from the territory on the Range to Channing over the Milwaukee as from the Range to Iron Mountain on the North Western, except for the work right at the mine. The North Western grades are downhill while the Milwaukee's are uphill so the North Western can handle the tonnage to the base points faster. The North Western can handle as much tonnage from Palatka to Iron Mountain as the Milwaukee can from Iron River or Palatka district, Iron River to Channing. Doubling occurs when a hill is reached over which the engine cannot pull trains. The train is divided, part being taken to the top of the hill, the engine going back for the rest and going on with the whole train when it is brought up (Rec. 123-125).

While under the pooling plan the handling will be by one line of railroad the service will be the pooled service; the joint service of the two companies both of which will support the investments and be responsible for the management, organization and equipment. In name there will be two roads using one set of rails for their people for their joint enterprise. The movements will not be entirely over the rails of the North Western but ore from the Amasa district will go over Milwaukee rails as far as Iron Mountain (Rec. 125-126).

In the past when a mine shipping by way of the Milwaukee decided to begin shipping over the North Western the ore billed and in the dock could not be exactly divided to make a full cargo for one boat so when the change was made there might be five to eight thousand tons less than a boat load, in the dock. The boat would take that and then go to the North Western docks to receive whatever tonnage was required to make a boat load. If the ore was all coming through one [fol. 213] dock that would never happen (Rec. 126-128).

Recross examination.

By Mr. Burchmore:

It is not true that the practice is greater of having boats go from North Western Dock No. 5 to its Dock No. 6 or vice

versa to complete loading than from a North Western Dock to the Milwaukee dock and back or vice versa. It might occur now and then, but would all depend upon what they are using the different docks for and how the space is allocated but there would be no particular reason for it and less of that would be necessary with the ore pooled (Rec. 128).

I witnessed the dock movement last summer and the year before. I am up there every two or three years sometimes two or three days, sometimes half a day and sometimes a few hours. I do not think I have ever seen a boat go from one dock to another (Rec. 128-129).

The handling of ore as to mixing varies as the ownership of the mines changes. Otherwise, except as to volume, it is no different than it was ten years ago (Rec. 129).

Beginning at the bottom of page 7 of the application is a sentence reading "*Road Haul.* The Milwaukee shall furnish train and engine men and perform the road haul of ore and North Western non-pooled business between the Amasa District and Iron Mountain and Crystal Falls." The non-pooled business coming from Amasa and Balsam may go to points south of Iron Mountain on the North Western. That is, as to business other than iron ore, the Milwaukee may handle it from Amasa either to Crystal Falls or to Iron Mountain. It might be convenient for the Milwaukee to take such traffic in their trains running through Balsam and Amasa down to Iron Mountain, but if it is traffic such as logs or poles to be delivered at Crystall Falls, the Milwaukee will deliver it there rather than hauling it down to Iron Mountain and compelling the North Western to haul it clear back (Rec. 129-131).

[fol. 214] Further redirect examination.

By Mr. Morehouse:

It happens that the final agreement has been signed by the North Western but not by the Milwaukee because the final draft was just finished yesterday and Mr. Scandrett the president of the Milwaukee is out of town. Mr. Sargent has signed it and Mr. Scandrett will sign it Saturday when he gets back (Rec. 131).

[fol. 215] CHESTER E. OLIPHANT, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

I am Chief Statistician of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and have been so employed since 1920. The title I have was given to me in 1925.

In the course of my employment, it became my work to handle this pooling arrangement and work it out in connection with the Chicago & North Western Railway. It is in line with my regular work in connection with practically being an assistant to Mr. Sparrow, Vice President of finance and accounting. The first thought that I gave to this plan that has finally been devolved here was in 1931, when we were considering the North Western docks in 1932, and gave some considerable study to it in the spring of 1933, bringing it to a tentative conclusion at that time as to the profitableness of the venture (Rec. 133-134).

The properties of the Milwaukee Road involved in this pooling are substantially as described by Mr. Hand. Exhibits Nos. 2 and 3 show the location and extent of the Menominee Iron Ore Range, the lines of railroads involved in the pooling, and the location of the ore docks and the yards at Escanaba. The active mining centers on the range are at Iron River, Crystal Falls, Iron Mountain, Norway-Vulcan (about 8 miles east of Iron Mountain), and Amasa (about 15 miles north of Crystal Falls). The Milwaukee Road serves all these centers except Norway-Vulcan and concentrates its ore therefrom at Channing. The ore is then moved, under trackage rights, over the line of the Escanaba and Lake Superior Railroad to the Milwaukee dock yard at Escanaba. The North Western also serves all these centers, but does not reach the single active mine at Amasa, and concentrates all of its ore, except from Norway-Vulcan, at Antoine, near Iron Mountain. The Norway-Vulcan ore is brought onto this line at Sturgeon via the cut-off from Norway. Empty ore cars are returned via the North Western's southerly line, and it also handles some ore from the Marquette Range over its docks at Escanaba (Rec. 134-135).

During the ten-year period, 1923 to 1932, inclusive, the Milwaukee handled 34.0 per cent and the North Western 66.0 per cent of all the ore mined on the Menominee Range. During the same period the Milwaukee handled 30.2 per cent and the North Western 69.8 per cent of all the ore handled over docks at Escanaba. Exhibit No. 5, compiled by me, and under my direction, shows the tonnages by years and percentages by years and the grand total upon which the 34 per cent and 66 per cent are based. The information [fol. 216] came from our freight auditor, from carloadings and dock records, and after the records from both companies were prepared, they were turned to the North Western for suggestions and corrections, and I believe it is a perfect statement of the tonnage, in gross tons of 2240 pounds (Rec. 135-137). (Exhibit No. 5 received in evidence.)

A considerable number of the mines on the range are served by both railroads and a considerable number of the mine service tracks are jointly owned; joint switching in the Iron River and Crystal Falls districts has been in effect for a long time (Rec. 137).

The Milwaukee's ore docks at Escanaba were built in 1901 and 1906 and are now in such condition that it is faced with construction of a new dock at estimated cost of about a million dollars. One of the North Western docks, rebuilt in 1925, has a remaining life of about 15 years; the other, rebuilt in 1910, has only a few years of remaining life. The Milwaukee used the North Western's docks in 1932 and 1933 under temporary arrangement, but returned to one of its own docks in 1934 (Rec. 137).

Both railroads interchanged traffic with the Escanaba and Lake Superior Railroad, the Milwaukee at Channing, and the North Western at Escanaba (Rec. 137).

Under the proposed pooling plan, the North Western will do all the switching on the range, except at Amasa, and handle all the ore from the range, except the small amount originating at Amasa, over its lines from the range to Escanaba, and over its docks and new joint docks as may be built. The Milwaukee will handle the small amount of ore originating at Amasa over its line to Iron Mountain or Antoine and there turn it over to the North Western for haul to Escanaba, and will handle the small amount of North Western non-pool traffic in and out of Amasa and Balsam,

and the North Western will handle the small amount of Milwaukee non-pool traffic, mainly coal, out of Escanaba. Incidentally, the two roads will pool their revenues on traffic interchanged with the Escanaba and Lake Superior Railroad (Rec. 137-138).

This arrangement will permit the Milwaukee to discontinue using the Escanaba and Lake Superior Railroad between Channing and Escanaba and to abandon its ore docks and dock yards at Escanaba, and will permit the North Western to abandon its branch line from Crystal Falls to [fol. 217] Amasa. It will permit both roads to abandon considerable mileage of separately and jointly owned mine service and yard tracks on the range, and reduce equipment required for ore movement. It will reduce dock capacity requirements (Rec. 138).

The North Western's lines are to be used because they most easily permit moving all the ore in one channel, an essential for economy; because of the better positions and larger sizes of North Western yards on the range at concentration points and docks; because it appears to be comparatively uneconomical to move ore from Iron River, Stambaugh, and Crystal Falls out over the Milwaukee to Channing; and because it is obviously uneconomical to move ore from Iron Mountain and Norway-Vulcan to Escanaba via Channing on account of greater distance and opposing grades. The opposing grade in the North Western's dock line between Sturgeon and Leaper, where helper service is required to handle full trains loading out of Antoine, has not been overlooked but considered fully offset by other favorable features of the route and connected facilities. Other favorable features, such as ability and willingness of the roads to discontinue use of and abandon property, without which the savings would be reduced, were considered. With the support of engineers and officers, it is believed the route selected is most suitable and will produce the greater saving (Rec. 138-139).

Revenues on Menominee Range ore, as accruing to both roads, will be pooled and divided 34.0 per cent to the Milwaukee and 66.0 per cent to the North Western—the division obtaining in the 10-year period 1923-1932, inclusive. All operating expenses, other than as related to the docks at Escanaba, such as maintenance expenses of pooled tracks on the range, mainly mine service tracks and yards; main-

tenance expenses due to use, determined under A. R. E. A. formula, of lines and yards between assembling yards at mining centers and docks at Escanaba, including facilities for locomotives and cars used in handling the ore; and transportation expenses, both road and yard,—all, as properly assignable or apportionable by both roads to the handling of Menominee Range ore, will be pooled and divided upon the same percentages as used in dividing the ore revenue (Rec. 139-140).

[fol. 218] Maintenance expenses of the equipment used for ore are not to be pooled as each road will contribute and keep repaired its pool percentage of locomotives, cars and cabooses required to handle the pooled ore. Running repairs on all such equipment will, however, be concentrated at as few points as practicable, for the savings to be obtained, and each road performing work on the other's equipment will bill the other at cost for such work. The road and road yard expenses of each in handling non-pooled traffic of the other will be determined by apportionments of the total related expenses in a manner similar to that provided for apportioning similar expenses to ore traffic. Terminal switching expenses for such traffic will be directly ascertained and billed at cost (Rec. 140).

Dock operating expenses, including depreciation charges and taxes; all such expenses as maintenance, insurance, fire protection, taxes, and, with respect to any investment hereafter made by the North Western for new docks or additions and improvements, annual amortization charges for retiring such investments, will be divided 30.2 per cent to the Milwaukee and 69.8 per cent to the North Western—the division of the total ore handled over or through docks by the both roads, 1923-1932. Direct expense of handling ore over or through the docks each year will be divided between the Milwaukee and North Western in proportion as 34.0 per cent of the Menominee Range ore (Milwaukee) is to 66.0 per cent of Menominee Range ore, plus Marquette Range ore (North Western) handled through the docks. Revenue accruing to both roads on business interchanged with the Escanaba and Lake Superior Railroad will, after each road has deducted from its contribution 30 per cent, to cover out-of-pocket expenses, be pooled and divided upon the basis of the division of the total similar revenues of both roads obtaining in the six- —period, 1926-1932. These per-

centages have not yet been definitely determined, but will probably be about 40 per cent to the Milwaukee and 60 per cent to the North Western (Rec. 141).

As to rents: with respect to the ordinary railway property used in handling Menominee Range ore, neither party is to pay the other party any rent for the use of the other's property beyond that effected by an equal division of savings in fixed maintenance expenses, i. e., maintenance not due to use as determined under A. R. E. A. formula; general expenses; taxes; rents; and interest on salvage (other [fol. 219] than from mine service tracks)—all as produced by abandonments of their properties or by discontinuance of use of properties of others. Milwaukee's payment to the North Western of one-half of the savings to be made in these items by discontinuing use of the Escanaba and Lake Superior, is to be increased or decreased in proportion as the tonnage of ore in any one year is to the average of the ore tonnage in the 10-year period, 1923-1932, inclusive (Rec. 141-142).

With respect to the North Western's present docks and any future docks, that may be built in connection therewith, the Milwaukee is to pay the North Western annually as rent for the use of the present docks—mainly No. 6 as long as it remains suitable for handling ore—30.2 per cent of $32,400 (about $10,000); and for the use of any new docks or additions or betterments to present or future docks, 30.2 per cent of interest charges on the North Western investment therein at rates the North Western pays for the money actually borrowed for the purpose—or on money otherwise supplied, the actual net rate currently being paid on money borrowed by the North Western for general purposes (Rec. 142).

In stating the estimated annual savings to accrue to both roads under this pooling, I should like to first submit an exhibit of three pages that I have prepared by myself personally. In this exhibit (received in evidence as Exhibit No. 6) is shown first the savings by discontinuing use of certain properties and common use of others, and thereunder, first, the savings in connection with ore docks. The program for the future, as to the docks, is not definite, though a number of programs have been discussed and a number of calculations made as to which is the most economical. The North Western docks will be carried as they

stand for a few years, until business picks up, but our first assumption is that if the pooling is not effected, the Milwaukee would build a new dock costing $1,000,000. The annual cost of owning and maintaining such a dock is taken to be the saving. When we use the North Western docks, we will pay them certain monies and part of their depreciation and maintenance (Rec. 142-143). A great deal of maintenance of timber docks especially is due to causes other than use, and maintenance due to use is here disregarded. Interest at 4 per cent on the $1,000,000 is $40,000. Depreciation on a sinking fund basis, 4 per cent— 25 years, is $22,000. That is, $22,000 put out at interest at 4 per cent for 25 years will net or return the cost of the structure less 10 per cent. Maintenance average, $25,000. That is a judgment figure after reviewing maintenance figures over [fol. 220] the last fifteen or twenty years, of not only our own docks but North Western docks, considering the differences in sizes and differences in use and drawing certain averages. It is presumed to be a figure fairly representative for this size dock and this class of construction (Rec. 144).

The replacement contemplated refers to a wooden dock and does not include rebuilding a foundation. We would use the foundation of Dock No. 1 (Rec. 145).

Taxes, I think I gave as $16,000. I used a rate of 1.2 per cent of $1,300,000, which is the full value of the million dollar dock including the estimated value of the foundation, which is already in. That per cent is based upon a study of taxes assessed against the railroads in the State of Michigan, against the investment value of the property in the State of Michigan or the value of the property in the State of Michigan over a period of several years. We have no record of the taxes directly assessed against our docks. They are not assessed separately (Rec. 144-145).

The $7,000 fire insurance is an estimate by our insurance officer, who stated in the neighborhood of $5,000 or $6,000 for that and the other is a nominal amount put in *the* for the watchmen (Rec. 145-146).

The sum of annual cost of owning and maintaining a dock, that is, in so far as the expenditures that would be required for a new dock, is $110,000.

1 (a) is what we would do if this pooling is not effected; we would build a new dock on the site of No. 1. The assumption under 1 (b) is that a new joint concrete-steel

dock will be built in a few years. The dock presumed is to be built, if the pooling is effected, by the North Western and for which we obligate ourselves to pay back over a period of its life our 30.2 per cent in the nature of an amortization as outlined in the contract. The present Dock No. 6, timber dock, of the North Western, will also be used for at least fifteen years. The new dock would be built near North Western Dock No. 6. Now whether it would [fol. 221] be built on the site of No. 5 or on a new site, in order to keep No. 5 going while the concrete-steel dock, which will probably take a couple of years to build, I don't know—that is, while it is being built (Rec. 416-147).

The engineers undoubtedly have taken into consideration that there is a quicker outlet after you drop below No. 6. This is assuming if pooling is not affected, the Milwaukee and North Western would each build separate new timber docks costing respectively $1,000,000 in the case of the Milwaukee and $1,500,000 in the case of the North Western. They have an estimate already prepared for rebuilding No. 5 that I think runs slightly in excess of $1,500,000. Competitive costs on this basis are decided in the following tabulation, which shows in the first three up and down columns under separate operation, and in the first column it shows the Milwaukee's cost with its $1,000,000 dock, which is the same as the figures above in (a). In the second column it shows a cost of the North Western's new dock in the top part; and in the bottom part, Maintenance, Taxes, Fire Insurance and Protection and includes both its proposed new dock and the present Dock No. 6. The third column brings both of these estimated costs together and produces an annual cost of $322,000 under separate operation (Rec. 147-148).

Depreciation is figured 4 per cent, sinking fund basis. The first line is 25 years, ten per cent salvage; that applies to the timber docks in the first three columns. When we consider the concrete steel dock in the last column, we spring the life to 59 years, and that is one of the things that reduces the depreciation or the amortization charges so greatly. That brought us to a total estimated cost (Rec. 148).

The estimated annual cost for the joint operation involves the capital cost and carrying charges on the new concrete steel dock, plus our maintenance, taxes and fire insurance and protection. The expenses in connection with

[fol. 222] Dock No. 6, timber dock, is $213,000.00 a year, or there is a saving by joint operation of $109,000. Now, just what the program would be after 15 years has expired and present Dock No. 6 is worn out, it is difficult to say, but guess about the same savings as those two shown here per year. It is necessary, of course, if you assume dock 6 will no longer be required after 15 years, to make a different assumption of what its individual or separate operations would require and it is very difficult to assume what might be after 15 years. We might find out by experience that the new concrete steel dock would handle the entire tonnage of even an average volume and the timber docks would no longer be needed, in which case probably the savings would be increased. The new dock would have increased capacity, 125,000 tons steady capacity, about 500 pockets of 250 tons each (Rec. 149-150).

Item 2, maintenance not due to use $2,625.00, under the first subject (a), in connection with the yards at Escanaba, on account of abandonment of Milwaukee Yard (12.5 miles of track), that is our established amount of maintenance not due to use on that yard. It is based upon the information we could get. We could not segregate in our accounts the amount of expense or the amount of work that had been done on that yard, that is the one shown in green on Exhibit No. 3. This maintenance not due to use is used throughout these different studies because the maintenance due to use is presumed to travel on the property that is going to be used with some expense and will not be saved; it will accrue on the property used and will be divided between users. Interest on net value of salvage—including land, will be four per cent annually on $15,000.00—$600.00; taxes, estimated $1,000; or a total annual saving in that item of $4,225 (Rec. 150-151).

In connection with lines between Range and Docks, on account of the Milwaukee discontinuing use of E. & L. S. R. R., these figures are the actual average figures paid [fol. 223] to the E. & L. S. over the period of 10 years upon which the ore pooled percentages were derived, 1923 to 1932, inclusive; maintenance of way and structure not due to use $41,950; rental, that is, all that rental over $27,000, $15,194; taxes, $15,019.; general expense $4,682; or a total of $76,845. These figures are repeated in the contract, both

in the preliminary draft that was attached to the application and in the final draft. Now, throughout here we are assuming these savings are in connection with the tonnage of the average of the ten year period. These figures are repeated in the preliminary and final draft of the contract.

Item (b) under 3 account, Account North Western abandonment of its Crystal Falls-Amasa Branch Line (16.0 miles of track):

Maintenance of Way & Structures not due to use	$2,681
Interest on net value of salvage—4% on $15,000	$600
Taxes	$1,000

Now, some of these figures are omitted from the contract because we said to each other that taxes on our abandoning our yard at Escanaba will offset the taxes on taking up your line between Crystal Falls and Amasa, we will just drop that out — consideration. The total savings, however, for this item is $4,281 (Rec. 151-152).

Item 4. In connection with tracks and yards on the Range, Account abandonment of duplicating tracks (20 miles of track):

Maintenance of Way & Structures not due to use	$5,000
Interest on Net Value of Salvage—4% on $20,000	$800
Taxes	$200
Taxes as a wild estimate, just an assumption.	
Total	$6,000

[fol. 224] Total annual savings in connection with fixed property as given above is $200,351.00 per year. If the tonnage is less, it would be something less than that. As of 1934 I would estimate the figure similar to this of 76,845 reported in connection with Account Milwaukee discontinuing use of E. & L. S. R. Ro at $50,000 instead of $76,845, which would lower the saving to about $175,000. All other savings arising from abandonments and account of joint use of the properties like docks would practically be the same year after year, notwithstanding fluctuation in tonnage (Rec. 152).

Now, under part B of this exhibit, Account handling all ore in one channel and under one operator: I have no figures. I merely make the statement: Savings to be obtained by quantity handling under one operation, such as the handling of ore over or through the docks; switching on the range,

at the intermediate points and at the docks; train service, particularly at the beginning and end of each ore season; and reduction in equipment required, particularly ore cars account elimination of duplicating standby requirements under separate operations, have been but roughly estimated and it is difficult to estimate these features in advance of actual experience. It is believed, however, that these savings will, for the average tonnage of the ten year period, equal if not exceed the savings shown above account of Fixed Property (Rec. 153).

The largest item of saving in this last that I have mentioned will be in the number of cars required, and that will not materialize immediately. I do not have the figures but would say that both roads require not less than four thousand and probably forty-five hundred cars on the Range. I have asked a number of people about the reduction in the requirement under the pooling plan and the highest estimate I received was a twenty-five per cent reduction. That would mean a saving of a thousand cars, and our steel ore cars cost about $2250, and I think a more recent price has been $2400, but, at that rate there would be over two million dollars sav- [fol. 225] ing in capital expenditures for new cars and the interest, depreciation charges, maintenance due to use and possibly a little taxes, it would be ten per cent at least, so that at that rate you would have $200,000 saving in the annual charges for cars alone. On the basis of the conservative estimate of a saving of only 500 cars it would amount easily to a hundred thousand dollars annually. These estimates ran as high as 25 per cent and the lowest was 10 per cent. In hearing the different parties I assume the saving would be 15 or 20 per cent. That won't materialize until cars are renewed. However, in the case of the Milwaukee, we have an excellent chance to reach $100,000 at once because we have some 500 wooden cars left and only 800 all steel cars. The wooden cars are rapidly getting to the point where they will have to be dismantled. I have quite a number of them on the program for this coming year (Rec. 154-155).

The Milwaukee owns a total of 574 wooden cars and a total of 800 steel cars or a grand total of 1,374. That I am sure is less than our ownership of some years ago when we had about 1,800 or 1,900 cars before we began our program replacing with steel cars. I think we bought our first steel cars in 1930. Our steel cars are normally rated at 70 ton; the

wooden cars I think are 50, I don't know. I do not know the actual number of North Western cars assigned to the Menominee ore range (Rec. 155-157).

Exhibit No. 7 a single sheet is taken from our annual report to the Interstate Commerce Commission. It is submitted merely to show our financial condition and implying the difficulty we may have raising a million dollars to build a dock. By "we" I mean the Milwaukee Railroad. (Rec. 157-158).

Under its contract with the Escanaba and Lake Superior the Milwaukee operates over that line with its own crews [fol. 226] and equipment as far as ore goes and with a certain restricted business of coal from Escanaba outbound, and certain construction material. We are not privileged to do a general commercial business along the lines of the E. & L. S. and can only move the ore on our own trains. The Escanaba & Lake Superior hauls no Milwaukee ore with its equipment (Rec. 158-159).

The Escanaba and Lake Superior interchanges traffic with the Milwaukee at Channing. The $27,000 referred to which appears on page 2 of Exhibit No. 6 is a fixed amount the Milwaukee must pay to the Escanaba and Lake Superior regardless of how much ore moves. I am pretty sure that the Milwaukee pays a wheelage proportion of a lump sum of $54,000, being a return upon certain value of the property and our wheelage proportion I think in these 10 years averaged about 82 per cent, so we paid 82 per cent of 54. There is a minimum provision, however, that at no time shall we pay less than half of that 54,000 or 27,000, whether we run anything over it or not (Rec. 159-160).

Exhibits Nos. 6 and 7 were received in evidence at this point (Rec. 160).

Cross-examination.

By Mr. Burchmore:

With regard to Exhibit No. 5 the period of ten years ending with 1932 instead of the ten years ending with 1934 was selected because the first detailed study was made in the spring of 1933 and that was after the completion of the year 1932 and we took the ten preceding years (Rec. 161).

By Mr. Burchmore:

Q. This is just a straw which shows the way the wind blows, that indicates that you really concluded this whole thing in 1933, but didn't make it effective?

[fol. 227] A. Well, you might say that since the negotiations have been under way— It has just been completed with the completion of the contract.

Q. But your studies were really completed in the larger sense in 1933?

A. Yes, I think that is correct.

Q. Now, when did you first give any publicity whatever, if you gave any publicity to this matter?

A. I believe we gave no publicity, none that I was aware of (Rec. 161).

The figures on Exhibit No. 5 relate to only tonnage from the Menominee Range on the Milwaukee Road which does not participate in any other iron ore traffic, that being the only iron range it serves. Years ago we used to get up into the south edge of the Marquette Range at Republic, but we haven't hauled anything from there for quite a while, and the only port to which we haul ore is Escanaba (Rec. 161-162).

The Milwaukee Road built north through Iron Mountain and into Channing prior to 1900 and first entered into the arrangement whereby its ore trains moved over the Escanaba and Lake Superior in 1900 or 1901 so that the Milwaukee has been hauling the Menominee Range ore into Escanaba over the E. & L. S. tracks for 34 or 35 years. The E. & L. S. was not consulted regarding this pooling arrangement to obtain its consent or views. This contract and pooling is a difficult matter. I wasn't confident that the thing could be put over, could be arranged until practically the application was filed. By "put over" I meant accomplished in a legitimate manner (Rec. 162-163).

Exhibit No. 6, part 1, shows certain savings for the next several years which would also be accomplished if the North [fol. 228] Western permitted us to use their docks at Escanaba without any pooling for the road haul provided they would do it upon the terms of the contract. Now, they might not agree to those terms unless the rest of the pooling was annexed to the dock use. The terms on which we used their docks in 1932 and 1933 were more onerous than the contract terms and I believe they were more expensive to them.

As I recollect, the first year we paid a flat rental of $40,000 and a share of the maintenance due to use. I don't believe we paid taxes. The next year we paid a tonnage rate. $40,000 is less than $40,000 interest plus four per cent depreciation. It cost less than $110,000 a year to use the North Western dock in 1932 and less than that amount in 1933. That is not as great a saving as the present contract terms, which for the present indicates a rental of only $10,000 till a new dock is built (Rec. 163-164).

Referring to the item designated (b) under part 1 of Exhibit No. 6, if the North Western built for our mutual use a concrete dock of 2 and ½ millions investment, I could not say how many vessels could tie up at that dock at one time. As to whether I suggest that such a dock would be as great in actual capacity for use by ore business as that business is conducted as would be the capacities of the North Western and Milwaukee separate docks referred to in (b), I couldn't say, unless the speed of handling ore through the docks in the pockets might be faster than that through the double docks. It would seem that the double docks, more spread out, would accom-odate more vessels. That might be a factor in the actual dock capacity. I don't know how much. It makes no difference how fast you pour the ore in if you are slow in getting it out, but you can pour it in a little faster if you can load the vessel and get it out. The ore is always there ahead of the vessel, or in the dock yard (Rec. 164-165). [fol. 229] The first figure $2,625, maintenance not due to use, on page 2 of this exhibit appears on page 26 of the contract, Exhibit 1. This figure represents maintenance not due to use as respect the yard at Escanaba. The figure of $2,681, maintenance of way and structures not due to use in respect of abandonment of the Crystal Falls-Amasa Branch is also shown on that page. These two figures are in the contract. In our cost study we also had a figure of interest on salvage and a figure for taxes in both these items. In the signed contract, however, it states "savings of salvage and taxes are omitted in II and III, as they approximately offset each other". We would be paying the North Western in connection with the yards at Escanaba one half of our savings in interest and taxes and they in turn would be paying us one half of their savings on interest and on salvage and taxes on the Crystal Falls-Amasa branch line, so we just dropped it out of the picture. We had it in our original draft

and it remains excluded on page 26 of the contract (Rec. 165-166).

Page 2 of Exhibit No. 6 has an item representing maintenance way and structures not due to use, $41,950. Words "not due to use" means not due to wear and tear by use. The American Railway Engineering Association developed a formula by primary accounts starting with rails. They said rails would be 100 per cent affected by use; ties 60 per cent, bridges 10 per cent and all the way down. Taking the account rails as charged against us in the primary accounts of the E. & L. S. we took 100 per cent. This is not due to use. They took 100 per cent for rail, but where they had ten per cent in the formula due to use, we took 90 per cent of the bridge maintenance as not due to use or as more or less fixed [fol. 230] whether you run a train over it or not, due to weathering, age, decay. For instance, all the maintenance of a fence would not be due to use. There would be no use factor in that, or in a telegraph pole. A bridge would only be ten per cent affected by use, ninety per cent not affected by use. The maintenance of the structure would be no larger with a large volume of traffic than if there had been no traffic. Theoretically, as a practical matter, when you don't have the traffic you retrench (Rec. 166-168).

The figure $15,019 taxes is taken from the actual bills of the Escanaba and Lake Superior against the Milwaukee for its share of taxes on the average for the ten year period ending 1932. That is true of all those figures. They can all be traced back to the actual figures (Rec. 168).

The saving indicated in Item (b) on page 2 relative to the abandonment of the Crystal Falls-Amasa branch is saving not due to use. They will pay the maintenance due to use through our formula for the use of our line for bringing their traffic down from Amasa or Balsam to Crystal Falls or Iron Mountain. They will also pay a proportion of our transportation expenses in connection with the cars that we handle for them down to those points or up to those points. This is all predicated upon permission of the Interstate Commerce Commission authorizing the abandonment being obtained. The North Western will also pay a proportion of the Milwaukee's transportation expenses in connection with the cars the Milwaukee handles for them down to those points or up to those points. It represents in a way as near as one can figure the net savings by abandonment of that line. I do not know whether the North Western line was

built before or after the Milwaukee built into Amasa. I do not know when the Milwaukee built from Channing over to Crystal Falls and Iron River but I think it was 1907 or 1908 (Rec. 168-169).

[fol. 231] Page 1 of Exhibit No. 6 indicates the maintenance by the North Western of a wooden dock would be $70,000, while the Milwaukee's maintenance of timber dock would be only $25,000. In the North Western figure there are two docks involved, present No. 6 and the new dock they would build, and we estimate the maintenance of the North Western docks on account of their larger size at $35,000 apiece and the taxes—but only one Milwaukee dock. We are figuring the North Western would build one new dock and continue Dock No. 6 having a life of fifteen years. The Milwaukee would build one new dock and abandon its other present one or utilize the foundation for new construction (Rec. 169-170).

[fol. 232] The North Western would build one new dock and continue Dock No. 6 which has a life of fifteen years yet (Rec. 170).

The second sentence of paragraph 27 of the contract reading "the use by either party of pooled trackage and facilities, including the main line of the Milwaukee between Amasa and Crystal Falls, shall also be permitted in the handling of non-pooled traffic to and from territory now reached and served by tracks and facilities which either party shall have abandoned pursuant to this agreement." By that the Milwaukee will not gain any use of the main line of the North Western. If the Milwaukee abandons a branch line, a mine service track, it may use one that is now owned by the North Western or subsequently connected pooled tracks to reach an industry or some point beyond. I have no particular place in mind where it is expected that will happen. It seems to me I heard of one, but have forgotten it, down in the Crystal Falls or Iron River territory. The Milwaukee has already abandoned some tracks, for instance at Norway with which it formerly reached ore mines years ago. Nothing material has been abandoned there within the last two or three years. Mr. Hand spoke of certain spurs at Norway and Vulcan that were in his opinion to be considered as pooled trackage. As to whether there is any chance of the Milwaukee getting in on that pooled trackage, the key to that paragraph, "which either party shall have abandoned pursuant to this agreement" is that even the use

of our main line from Amasa down to Crystal Falls would fall partly under that proposition because the North Western is abandoning a facility of their own and thereafter will certainly be handicapped. They will have burnt their bridges behind them. I believe this paragraph 27 is a mutual benefit to both companies; at least it does no harm (Rec. 170-172).

I take the phrase "pooled tracks" or "pooled trackage" to mean all the trackage in connection with ore mines other than main lines, and there is a question in my mind whether it does not include our main line from Amasa to Crystal Falls. By segregating that property all the maintenance that is to be paid is to come into the pool and to be shared [fol. 233] 34 per cent by the Milwaukee and 66 per cent by the North Western. On the main line there is a long formula to go through to segregate the pooled traffic from the non-pooled traffic and then to split the non-pooled traffic from the pooled traffic and then to make the assessment to the two roads (Rec. 172-173).

Under paragraph 37 which relates to switching and paragraph 38 relating to road haul the Milwaukee will be relegated to a very minor position so far as doing any work is concerned. The matter of disposition of Milwaukee crews who may be put out of work by the reduction of man hours of train men's labor has been discussed to some extent. My personal idea was that it was left out of the formal arrangement with the idea that the local unions on the different roads would themselves settle the matter of their rights to the pool work. I believe Mr. Gillick, vice president in charge of operation has had some conferences with our train men on these subjects (Rec. 177-178).

[fol. 234] By Mr. Burchmore:

Q. Now directing your attention to paragraph 51 of the contract, Exhibit No. 1, the first sentence, "The Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad and shall discontinue and abandon its yards and other facilities at Escanaba, except its coal dock and tracks appurtenant thereto." If you discontinue operations between Channing and Escanaba, what use will you have for any coal dock or any other tracks whatever at Escanaba?

A. Except that such business as we may get from that coal dock under the terms of this agreement at some other point or place, providing, that the North Western shall haul a small amount of Milwaukee non-pooled business, particularly coal out of Escanaba.

Q. That coal up to this time has been handled by the Escanaba and Lake Superior Railroad?

A. Except during the ore season, we are privileged to handle in our trains coal out of Escanaba.

Q. But, as a matter of fact, the Escanaba and Lake Superior has been handling that coal?

A. I am pretty sure, through the winter season; I am not so sure during the summer seasons.

Q. "The Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad;" is that a commitment which your Board of Directors have authorized?

A. Well, I understand the Board of Directors have approved the plan in its entirety.

Q. Do you know when such action was taken?

A. It may have been the February meeting of the Board, the third Thursday in February, or it may have gotten into March, I am not sure. It was a recent meeting (Rec. 178-179).

Paragraph 55 of the agreement is only in the new draft, it was not in the contract as attached to appendix A to the application.

[fol. 235] Paragraph 55 is a covenant that the North Western will join with the Milwaukee in rates and divisions.

By Mr. Burchmore:

Q. Isn't it with reference to paragraph 51, the first sentence, that this 55 is put in, namely, you will retain your coal yards at Escanaba, coal docks and yards and the track appurtenant thereto and make a new through rate for coal with the North Western?

A. No. The coal from the ore docks at Escanaba is particularly the small amount of the non-pooled business mentioned elsewhere in here that is to be handled by the North Western for us, being our agent, purely by way of agency, to get that out. This refers to all other commercial business other than ore and this particular coal.

Q. 55 is intended to refer to other commercial business?

A. To the commercial business the same as now being handled through Channing.

Q. Well, did you notice the fact that Mr. Hand when I asked him for an illustration of Paragraph 55 immediately thought of coal as the illustration, and that is the one you exclude?

A. Well, I think he also mentioned coke.

Q. Coke, that is right.

A. I remember one car of coke from the Terre Haute Division on our railroad that went to the city of Escanaba. That probably was in his mind (Rec. 180).

I think the Milwaukee initiated paragraph 55. It is in the category of general protective clauses, to provide against a contingency in the future where a channel we now have might be impaired, or to create a balance between the North Western and the Milwaukee in business other than iron ore (Rec. 181).

Paragraph 52 and several succeeding paragraphs are under the heading "Traffic Interchanged With the Escanaba and Lake Superior Railroad". That means traffic interchanged by the Milwaukee Road with the Escanaba and Lake Superior at Channing and the North Western inter- [fol. 236] changed with the Escanaba and Lake Superior at Escanaba. Paragraph 52 was put in at the Milwaukee's request. It is a more protective measure for it than for the North Western (Rec. 181).

Q. What leads you to assume "that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad"?

A. I would say that that should have been probably stated "may cease to obtain" instead of "will." It is too positive the way it is drawn. We "may cease to obtain."

Q. What leads you to infer or suppose or assume that you may cease to obtain?

A. Well, through the arrangement and contract with the Escanaba and Lake Superior Railroad, our arrangements have been very friendly and we think some of this business we are getting through Channing is due to the Escanaba and Lake Superior Railroad; that after the pool service is put in effect, that they may not be so friendly and it is

just a contingency of that kind, there may be some change—some switching business we are trying to protect the Milwaukee from. We hope it won't materialize (Rec. 181-182).

The language of paragraph 53 "Should the North Western subsequent to the date this contract is entered into acquire the trackage of the Escanaba and Lake Superior Railroad," is considered a remote contingency. It has not occurred to me that the North Western may have some purpose in that direction if the price is reduced. It has been a general thought that small lines throughout the country are to be taken over by the larger and stronger lines. While the Commission thought that if that occurred the Escanaba and Lake Superior railroad should go to the Milwaukee that was contingent on the Milwaukee's contract with that line and once that is given up the Commission may have a different view (Rec. 182-183).

Paragraph 54 reading "In case the North Western should acquire the terminals of the Escanaba and Lake Superior Railroad" is somewhat similar to paragraph 53. One is voluntary, the other is involuntary (Rec. 183).

By paragraph 82 defining the term of the agreement stating "that the Milwaukee shall have the right, upon permanent withdrawal from the ore business on the Menominee Range to terminate the agreement at the end of any calendar year" the Milwaukee solemnly covenanted that it would have no right at all upon a cancellation of the agreement unless it permanently withdrew from the Menominee Range [fol. 237] ore traffic in its entirety, and that is the only iron ore traffic the Milwaukee has (Rec. 183-184).

As I stated the Milwaukee actually used the North Western docks at Escanaba for discharge of its iron ore in 1932 and 1933, but not in 1934. As against Exhibit No. 6 paragraph 1 (a) we actually paid $40,000 flat rent in 1932, with a tonnage proportion of the maintenance due to use only, not maintenance due to weathering or decay. That year we handled the lowest tonnage of record something like 125,000 tons—shown on Exhibit 5, as 125,307 tons. The payment for maintenance due to use was a very small amount, something like a thousand dollars making the total around $41,000 and not $110,000, the figure employed in paragraph 1 (a). The latter would have been our expenses if we had built a new dock (Rec. 184-185).

In 1933 we handled 503,936 tons of ore over that dock and paid the North Western in the neighborhood of $60,000, having switched to a price of 12½ cents per ton to cover all the payments we were to make (Rec. 185).

By Mr. Burchmore:

Q. And were the North Western docks used to their full capacity that summer by the ores of the two companies?

A. Oh, I don't think so; by no means.

Q. By no means. Are you aware that in presenting this application to the Interstate Commerce Commission the applicant companies represented that there was a great emergency required that this arrangement be made effective for this present ore season?

A. I have read that. I just don't remember the exact wording.

Mr. Morehouse: It is desired, I can state that in transmitting the application to the Commission for filing, I called the Commission's attention to the fact the ore season would soon open and that it was desired, if the Commission acted favorably, to have them act on the matter no matter which way they act, it was desired to have them act as soon as possible, that in order arrangements might be made for the proper handling of ore for this [fol. 238] season and I think I mentioned that navigation on the lakes usually opens any time from the fifteenth of April on and for that reason, we requested that the matter be set down for hearing at an early date as might be conveniently arranged by the Commission.

By Mr. Burchmore:

Q. What is that emergency?

The Witness: Well, as far as the Milwaukee is concerned, an emergency existed with respect to our docks; we had gone along through the Winter and Fall since last ore season expecting this contract to be consummated and the hearing held and failed to repair our docks which might have been done at an exorbitant price and cost, and there was no assurance that we would have any docks for this coming year at the time this application was made (Rec. 185-188).

From the standpoint of the Milwaukee the ore it transports to Escanaba during the season of 1935 could be de-

livered through the North Western docks as it was in 1932 and 1933, if the North Western would let us use their docks and if that were allowed at a rental reasonable and satisfactory to the Milwaukee (Rec. 188-189).

The ore cars of the Milwaukee referred — in Exhibit No. 6 handle only ore traffic of the Menominee Range. These cars are somewhat different from the Milwaukee's box cars, gondola cars, and flat cars, in that the latter wander around the whole country as a part of the National pool (Rec. 189).

In 1932, 1933 and 1934 the Menominee Range iron ore traffic was very much less in volume than in 1923, 1924, 1925 and 1926 over both roads. As to the supply of wooden and steel ore cars then and now, my recollection is that we had from 1800 to 2000 cars back in 1925-1926. At the present time we have about 13 or 14 hundred cars. Older cars have been gradually dismantled but the older cars are not the cars I had in mind in speaking of the reserve supply on direct examination. There may be some of this older equipment on reserve but I had in mind the supply of cars that must be kept on hand by the Milwaukee where it does not [fol. 239] know whether it will serve a joint mine in a particular month or the North Western will serve it, but both keep a supply of cars in the mining region awaiting loading. That is also a common practice with reference to logs, lumber and gravel traffic but if you had a common pool one road might supply the demands (Rec. 189-190).

For the train movement one day would suffice to get a car from any point on the range to the ore dock yard. Each car is loaded at the mines in a very few minutes and the unloading at Escanaba is done very quickly, outside of storage or the awaiting of information regarding chemical contents and the matter of grading (Rec. 191).

Our steel cars are normally rates at 70 tons and the wooden cars at something less. My guess would be that we could get along with 1500 steel cars, for average tonnage, for average conditions; that might crowd us in years of great volume (Rec. 191-192).

I can't give you the mathematical calculation I used in estimating the number of cars that could be dispensed with if the pooling arrangement went into effect. It was a matter of judgment and opinion after talking to people that a considerable percentage could be saved of the total required by both companies (Rec. 192).

If the pooling arrangement became effective, in my judgment, the savings would not be sufficient to warrant reduction in freight rates. It would make the ore traffic more truly compensatory than it has been in the past (Rec. 192-193).

Questions by Mr. Boone:

As far as I know the contract does not contain any provisions for taking care of the property loss of the employees or their expenses in moving, in the event that becomes necessary in order for them to obtain employment. I cannot say whether there is an understanding between the two railroads that the employees will be permitted to transfer back and forth in line with their personal desires. It is my impression that it is the general understanding that the employees of the two roads will themselves either agree or arbitrate the matter themselves as to how the work will be allocated between them. I am sure the decision of the [fol. 240] employees will be accepted by the Milwaukee Road (Rec. 194-195).

Redirect examination.

By Mr. Sutherland:

The rental under the pool arrangement will be less particularly for the next few years before any new docks are necessary. The North Western has agreed that whether this pooling plan is put into effect or not, we may use their docks this year upon the terms of the contract, but for future years we have no arrangements. The Milwaukee dock cannot be used this year and it is too late to put it in shape for the ore season (Rec. 196-197).

Recross-examination.

By Mr. Connelly:

The Milwaukee's docks were not repaired to meet the ore demand of 1935 because we anticipated the consummation of the contract and the permission of the Commission (Rec. 197).

[fol. 241] GUNNER TORNES, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

I am employed by the Chicago, Milwaukee, St. Paul & Pacific Railway in the capacity of Superintendent of Bridges and Buildings. I have been in that department for twenty-nine and a half years.

The matter of repairs, construction or reconstruction of the Escanaba iron ore docks comes under my department (Rec. 198).

The two Milwaukee docks at Escanaba have reached the limit of their usefulness. They are not in condition to be used at present and if the Milwaukee is to continue individually to handle ore there, it would be necessary to construct a new dock of sufficient capacity, at a cost of approximately $1,000,000 if we utilized the foundation of present Dock No. 1. That would be not a concrete, but a timber dock. The foundation is not in shape to be used but can be put in shape by driving additional piling and the cost of this is included in the estimate of $1,000,000 (Rec. 198-199).

The present Dock No. 1 has a capacity of 42,000 gross tons. Such a new dock would have 67,200 gross tons (Rec. 199).

The Milwaukee's Dock No. 2 was used last year. It was necessary to spend approximately $30,000 for repairs before use. That creates a small benefit for the use this year but it is of no consequence. The old docks have now reached the point where repairs are not practicable (Rec. 200-201).

Cross-examination.

By Mr. Burchmore:

I do not know what charges were made in the Milwaukee's accounts as to charges made to current maintenance or to investments. The figure of $30,000 is based on the Bridge and Building Department estimates (Rec. 201).

(The witness was asked and consented to look to his files and later state for the record when he was first requested to make estimates as to what it would cost to put either

of the Milwaukee's docks in shape to handle business for the current year.) (Rec. 202.)

[fol. 242] I made an estimate of the cost of repairing Dock No. 2 shortly after inspection last Fall. The cost would be $64,080, and covers general repair to docks and approaches. The capacity of Dock No. 2 is 42,000 ton. I don't know at all whether the revenues that would have been obtained from the dockage charge would have paid that repair bill or not (Rec. 203-204), I know nothing about the revenues.

My estimate includes ten days time of a work train crew, 100 days' time of a crane, 100 days' time of a small crane, 60 days' time of a tractor and man, two crane operators and firemen and two general foremen, a blacksmith, a saw filer, a clerk, for 100 days each. In addition therein there is over $30,000 of miscellaneous labor, so a large part of the $64,000 cost would have been labor (Rec. 205-207).

[fol. 243] D. W. KELLY, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

I am General Superintendent, Middle District, of the Milwaukee Railroad. I have worked for the Milwaukee Railroad since 1896. The first job I had was at Sidnaw, Michigan, between Sidnaw and Channing. That is on the Superior Division that includes Channing. I have been familiar with that country up there ever since. I left there about 1919 and was transferred and returned again about 1926, but all the rest of the time I have been more or less familiar with that territory (Rec. 207).

The Milwaukee's line of railroad from Channing to Ontonagon was operating in 1896; my recollection is it was built in the early nineties. There is regular service between Channing and Ontonagon and it is possible for traffic out of Amasa and Balsam to be handled in that regular service which is substantially daily service (Rec. 208).

My recollection is that the line to Crystal Falls was built about 1900 and to Iron River about 1913. As to whether

the ore could be more conveniently and economically assembled in the yards of the North Western in the Iron River District that in the Milwaukee's, the North Western was in that territory a long time before the Milwaukee was and took all the best grades and best lines towards their yards. The only place where we participate in ore at present is in the northern district and at the Dober and Hiawatha Mines. In the Northern District that switching is all performed by the North Western and there is a decided grade from a point near the James mine to our Bates interchange where they deliver cars to us. There they handle eight or nine cars making deliveries, while towards their Stambaugh yard they can take 18 or 20 cars (Rec. 209-210).

There is one mine in that district, the Bates, adjacent to our Bates interchange and the North Western movement to that point is just a switching proposition and I would say they could deliver ore to us very much more economically from that one mine than they could take it around to Stambaugh (Rec. 210).

[fol. 244] We do not get into the Palatka District at all, and I think the reason is because of the grades towards the Palatka upon our line which is uphill. I would not think the Bates yard of the Milwaukee would be large enough to use for an assembly yard for the ore in normal seasons. You could not get the ore from the Palatka District. We never get it over our line. There is a connection with the North Western at what is called Rogers. This line of the North Western crosses our line just a little bit west of Bates. To move the ore up over that line, they would go up against almost a 200 (?) per cent grade. Then, they would have to move up on what they call the interchange train going into the Northern District and back out onto our line and saw back into the yard.

By Mr. Sutherland:

Q. I am speaking about, of course, pooling?

A. Yes.

Q. If this pooling plan goes in, which way could the ore go most economically?

(Objection by Mr. Burchmore.)

Q. You understand, Mr. Kelly when I asked for the most economical way of assembling ore, that ore, that it has ref-

erence to this pooling plan, at which yard it could all be assembled most economically?

A. Yes, sir (Rec. 210-211).

I am familiar with the Milwaukee's line from Iron River to Channing but I am not so familiar with the North Western line from their Palatka territory to Iron Mountain. I know about what they haul and have been over it. Under the proposed pooling the Milwaukee is to handle ore out of Amasa and Balsam over to Crystal Falls or Iron Mountain. If it was not taken under the pooling plan and it was produced in quantities similar to what it has in the past, the Milwaukee would probably have to perform extra service to switch it and take care of the loading and probably have to move the ore in a full train to Iron Mountain. That is the only part of the road haul allocated to the Milwaukee under the pooling plan and under the plan the ore would go to Iron Mountain and other traffic might go to Crystal Falls (Rec. 212-213).

I don't believe anybody could say how long it takes an ore car to make a round trip, unless you take the average for the entire season, because there is always ten or fifteen per cent knocked out for bad order. If the boats are moving freely I presume you can make this round trip in a conservative estimate of three days, allowing only one day for [fol. 245] switching at the dock, but the big delay has been waiting for boats (Rec. 213-214).

A great deal of ore is stored in the cars and that is another factor having to do with the number of cars required to handle the entire movement. The most cars the Milwaukee ever had up there was about 1900 and that was along 1920, which was one of the biggest years. We were short on equipment (Rec. 214).

I do not know whether the ore is subject to demurrage when stored in cars but it is when it is unloaded on the dock (Rec. 214-215).

From Channing to Escanaba is 63.5 miles; from Antoine to Escanaba via the C. & N. W. 54 miles; From Channing to Iron Mountain over the Milwaukee it is 24 miles. Channing has been a division point since before I went to work there in 1896 and that was before the Milwaukee handled any ore over the E. & L. S. (Rec. 215-216).

The arrangement for moving ore over the Escanaba & Lake Superior began in 1901. At that time the Milwaukee

had no tracks into Iron River. It went only as far as Crystal Falls or possibly Kelso Junction. The ore business had nothing to do with making Channing a division point. There were more men there 35 years ago than now as they did a heavy logging business (Rec. 216-217).

Prior to the arrangement with the Escanaba and Lake Superior the ore moved to Pembine via the Soo Line and from there to Gladstone. The Soo Line at one time operated their own crews into Iron Mountain over the Milwaukee Line and we delivered the ore to them at Iron Mountain. We received ore at Champion, Republic and in the vicinity of Iron Mountain and the ore reached the docks at Gladstone 10 miles north of Escanaba. Pembine is 14 miles south of Iron Mountain. At that time the Milwaukee was not yet getting ore from Crystal Falls or Iron River. The Milwaukee began moving ore from the Crystal Falls territory about 1901 (Rec. 218).

[fol. 246] In the earlier years of the movement of this ore, 1901, through 1904, most of the ore that the Milwaukee handled was produced in the Iron Mountain territory. That ore was handled from Iron Mountain to Channing, when we started to operate over the Escanaba & Lake Superior, and thence over that road to Escanaba.

If the pooling plan goes into effect, Channing would still continue to be a division point. It was before and it will continue to be afterwards.

As to the grades between Channing and Iron Mountain, between those points we haul about 2000 tons. The grades are more favorable from Iron River to Crystal Falls and we can haul more ore from the Iron River District to Channing than from Iron Mountain to Channing in one train (Rec. 219).

I am familiar with the location of the Milwaukee's assembling yard at Escanaba. To switch ore out of that yard up and on to the North Western's docks is not a convenient movement. The Milwaukee yard was built with the idea of movement to the Milwaukee docks. To state what are some of the difficulties that are encountered in attempting to use that yard in connection with the North Western's docks, first of all, of course it is very uneconomical to use two yards. I am satisfied if the ore were all moved into one yard, it would have a decided advantage in assembling and switching it. Now, when the ore is handled in the Mil-

waukee yard, naturally the North Western has to get a special engine and send it over there to classify that ore and move it over to the docks over a wide (Y)? track and I think they go partially over the Escanaba & Lake Superior Railroad to get it up there. As compared with ore that comes directly into the North Western Yards—the North Western has a decided advantage in handling their ore from its own yard to their dock than we would have in handling our own ore from our yard to the North Western dock.

Cross-examination.

By Mr. Burchmore:

Palatka is a point a few miles south of Iron River and Stambaugh. Palatka is a locality or area containing tracks of the Chicago & North Western Railway. The Milwaukee road does not have any tracks in Palatka. There are four mines at and adjacent to Palatka, the Zimmerman, Young, Fogarty and Berkshire. These mines are served by spur tracks owned by the North Western Railroad and are operated by that company. That is true today and has been true in years past. The ore from those spur tracks goes over the North Western Railroad to reach Escanaba, passing through Stager, Iron Mountain and Antoine. None of this ore from these mines or spurs near Palatka moves today via the Milwaukee road. If this pooling plan goes in, the ore will continue to move via the North Western from these Palatka mines (Rec. 219-222).

[fol. 247] Ore from Iron Mountain-Stambaugh and Crystal Falls section, all those sections, if today shipped via the Milwaukee would all go through Channing. Prior to 1901 the Milwaukee was handling ore from mines it served as far as Iron Mountain. The Soo Line took the ore with its crews from Iron Mountain over Milwaukee tracks south to Pembine and then over its own line east to Gladstone and we also ran our crews into Gladstone. We used to split up that mileage. The ore was handled over the Milwaukee rails to Pembine Junction and over the Soo Line rails to Gladstone and through a Soo Line dock and the crews were generally Soo Line crews (Rec. 222-223).

After the Milwaukee made the contract with the Escanaba and Lake Superior the latter road's main line was built into Channing. After that, the Milwaukee delivered ore

with its own trains and crews from Iron Mountain and vicinity north to Channing and east to Escanaba and discontinued using the Soo Line. In 1900 the Milwaukee had no railroad into the Iron River Section, but in 1900 a line was built into Crystal Falls. The arrangement with the Escanaba and Lake Superior in 1901 was coincident with the Milwaukee's going into the Crystal Falls ore traffic (Rec. 223-224).

In 1900 the ore cars were of small capacity and built of wood. I have seen cars go from Crystal Falls to Escanaba and return in three days, over the Escanaba and Lake Superior Railroad, and again it has been a good deal longer. It depends on how rapidly they can handle ore at Escanaba and how frequently they get the boats. The only delays are really delays at the dock end because of cars being culled out because of defects or because of the ore freezing in cold weather (Rec. 224-225).

In 1901 the predominant traffic over the Milwaukee Road was forest products and at that time Channing was a Junction, as today, of three main lines, the line from the south coming up from Chicago, the line to the north to Champion and Republic and the line to the northwest to Ontonagon. At the present time the logs and pulp traffic [fol. 248] would be about ten per cent of what was handled in 1900 (Rec. 225-226).

Questions by Mr. Connelly:

Under the plan the Milwaukee is just to handle the ore from Amasa. The mine at Amasa proper has been abandoned for a good many years. The Warner mine this side of Amasa, which we serve directly operated last year. There is a stock pile at Warner mine, and we understand there is still plenty of ore there; that it is one of the best mines on the ranges. The Milwaukee will handle any ore offered at the Warner mine or any other mine in that district but will not get ore from Crystal Falls (Rec. 226-227).

The district between Amasa and Crystal Falls is on the Ontonagon line. There are several mines between Crystal Falls and Amasa but the Milwaukee's line does not go in that direction. The line from Kelso goes direct up there through Balsam and Amasa and those are the only mines on that line (Rec. 227).

As to the ability to handle more cars from the North Western yards on to the docks than from the Milwaukee yards at Escanaba. Before we decided to go into the contract with the North Western, Mr. Barrington the assistant general superintendent and I were up there and made a test and decided that about all that could be handled from our yards to any advantage was about 35 cars while the maximum of the North Western is about 60. They convinced me that they couldn't safely take 60 cars out of our yard and take them up that way. I do not feel the number of cars you can handle to the dock with one engine has very much bearing on the situation (Rec. 228-229).

The Milwaukee cars and North Western cars are constructed the same, the former are a little heavier and possibly handle a little more tonnage. There are no grades between the Milwaukee yard and the North Western yard at Escanaba but there are three curves and you go around an entire circle (Rec. 229-231).

We do not handle our ore to the North Western yard. When the North Western handled the Milwaukee's ore they made up and picked up the trains in the Milwaukee's yard. [fol. 249] When you come to making your trains in the North Western yard, and mixing the ore, they have a decided advantage where they can have it all in one yard and mix it instead of sending it over to our yard. From the Milwaukee yard to the south end of the dock in about 11,500 feet compared to 5,800 feet to the east end of the dock on the North Western. It is not more difficult in switching the ore —that is the mixing of it—in the Milwaukee yards than in the North Western yards. We could switch as many cars there as we could on the North Western. There is one trunk highway to cross in going over the Milwaukee yard. The same highway is crossed by the North Western but there is a grade separation (Rec. 231-233).

Questions by Mr. Boone:

Channing is a terminal for this division of the Milwaukee, has been for a good many years and is a point where the men in engine and train service live and make their homes. They work out of there to the mines and back on the Milwaukee and other crews operate from that point to Escanaba and return to Channing (Rec. 233-234).

It is pretty hard to say what will be the condition of those men in the event this pooling arrangement goes through. The main division terminal on that division is at Green Bay and it just depends on a man's seniority. Now, some of those men come up from Green Bay and operate those ore trains. The men that operate the ore trains do not necessarily all live at Channing, and it is hard to tell. If the pool is put into effect, 34 per cent of the men are furnished by the Milwaukee Railroad, with their engines and cabooses and cars. Those men may come from Green Bay and take those jobs. I think probably they would. I would not say that all of the men in the ore service have had their homes in Channing because they come from Green Bay in the summer time and work in that ore business. There are a certain number of men that live in Channing employed there (Rec. 234-235).

The crews that may follow their business on the North Western Railroad in ore service and live in Channing would not probably get home unless they laid off. They would be away from home whether they worked on the North Western [fol. 250] on the extra list at Green Bay or from the extra list at Channing, but my thought is that if the arrangement goes into effect, they will probably stay for the summer, a few of these men; they might stay right in that North Western territory during the ore season. The last season was 158 days (Rec. 235-236).

There are a good many railroad men today operating on those divisions who are not at home all the time. They go wherever they have seniority rights and are entitled to go to get a job and anybody would attempt to get a job for a 158 days no matter where they have to go to get it. Then, of course if a man in Channing can hold regular service he is going to stay, but even — a man has been in regular ore service on the Milwaukee and has a home at Channing and desires to continue in that service and to profit by the better employment afforded him in that service, he must of necessity remain permanently away from home (Rec. 236).

Redirect examination.

By Mr. Sutherland:

Since the ore season is only five to seven months the men who run the ore trains in the summer time work in whatever service there is the other five months if they stay at

Channing. But last winter we had men who had homes in Channing who came down to Green Bay and worked out of there. I don't think any new situation would be created in that respect because of the pooling. As to whether it has been worked out so the Milwaukee men will operate on the North Western rails, I could not say. The railroads do not have the absolute say so about that. The organizations have machinery set up to take care of situations of that kind (Rec. 237-238).

Recross-examination.

By Mr. Boone:

I think Mr. Gillick had one meeting with representatives of the brotherhoods. If there were six crews in the ore service in 1934 and 1935, under the pooling there will be six [fol. 251] less crews laying over at Channing and six less jobs at Channing for Milwaukee men (Rec. 238-239).

I do not know whether or not the general public has ever been invited to meetings with the employees relative to the pooling (Rec. 239).

[fol. 252] H. M. Eicholtz, being first duly sworn, testified as follows:

Direct examination.

By Mr. Morehouse:

I am Assistant General Manager of the Chicago & North Western Railway Company.

I have occupied my present position for ten years and prior to that spent 45 years in the operating department of this same railroad (Rec. 240).

I am familiar with the proposed pooling arrangement and the contract in a general way.

I am familiar with the Menominee Iron Ore Range territory and the tracks and conditions in that territory and leading over to Escanaba, in general the territory shown on Exhibit No. 2 and have been familiar with it for about 17 years.

Q. There has been some discussion here and some questions asked regarding the facility and economy in handling

ore and in whether the ore can be handled both over the Milwaukee and the North Western from this territory over the line of the North Western from Iron Mountain to Escanaba and under the other arrangements proposed in this pool as compared with possible handling of all of the ore by the Milwaukee over the route which they have heretofore used from Channing to Escanaba. I would like to have you state in a general way—give us a comparison of the two routes.

A. Well, basing a comparison on the possibilities in the way of locomotive rating over the main lines of both railroads and the assembling costs, I reached a conclusion that it would be more economical to handle over the North Western Railroad, and there is one particular reason which would make it more advantageous to handle the ore over the North Western Railway than over the Milwaukee, to which I have given more weight and that is the double track of the North Western between Iron Mountain and Escanaba.

To develop that particular reason a little further, the movement of the ore over the north track is shown on Exhibit 2 and the return of the empties over the southerly track of the North Western is shown on the same exhibit; to get the effect of a double track and avoid the delay and expense, the train movement, train operation. That is important in connection with this ore movement because it makes it possible, in the first place, to expedite the loads and just as important to expedite the movement of the empties.

Q. Is the volume of the ore movement in the busy time of the average ore season such that there would be any delay or interference if the loads had to move in one direction and the empties back in the reverse direction over a single track, to handle the entire volume of the Menominee Iron Ore Range?

A. Yes, sir, it would create a condition which could hardly [fol. 253] be tolerated in the handling of this traffic.

If it were attempted to handle that entire volume of ore over the Milwaukee road, the Iron River, Stambaugh and Palatka ore would have to be assembled at Bates Yard on the Milwaukee, and the facility at Bates Yard is inadequate to handle all that traffic and the facility for transferring the ore from the Palatka mines to the Bates Yard would be inadequate, that piece of line would have to be double

tracked and especially because of the bad grades in it and moving from these mines to the Bates Yard (Rec. 241-243).

[fol. 254] In assembling the ore from the northern ore, Iron River district into Bates Yard, it is much more economical to handle it into the Stambaugh Yard of the North Western than to Bates Yard of the Milwaukee, on account of one particularly exceptional curve in the Bates mine. The grade is much heavier moving to the Milwaukee from all the mines excepting the Bates mine and one of the smaller mines that is not working at the present time (Rec. 244).

From the Crystal Falls District, except the ore from one or two mines near Alpha, it might possibly be assembled just as cheaply for movement over the Milwaukee as over the North Western. The Alpha ore would have to be moved over heavy grades to be assembled for the Milwaukee. From the North Western it would be a down grade movement, comparatively clear into Stager. The grades from all of these mines near Iron River in the vicinity of Stambaugh and Palatka to the assembling yards of the North Western are down grades from the mines to the yards with one or two exceptions, at Bates and Rogers. In the Palatka District the movement of ore from the mines is very short and direct to the yards except for the Bates mine (Rec. 244-245).

The mines at Stambaugh and Iron River are also located closely adjacent to the North Western assembly yard (Rec. 246).

To haul that ore from those districts to the Milwaukee Bates assembling yard involves an uphill haul with the exception of the two mines mentioned at very much of a grade. From the Iron River mines in the Northern District the maximum grade to the Milwaukee is 1.83 per cent and from the Palatka District to Bates yard the ruling grade is over 2 per cent. No ore moves there from Palatka to Bates. It is a place where ore would have to move if the Milwaukee were moving the pooled ore over their route (Rec. 246-247).

[fol. 255] From Iron Mountain it would be very much more expensive to haul the ore via the Milwaukee Road because of the grades between Iron Mountain and Channing and as to the Norway-Loretto-Vulcan district, if the ore were handled via the Milwaukee it would have to be hauled back from 11 to 15 miles to Iron Mountain and then

over the Milwaukee to Channing and Channing to Escanaba, which would be a very expensive proposition and about four times the cost of handling it direct over our northern line (Rec. 247-248).

Comparing the movement of ore from the North Western docks at Escanaba as it would be under the pooling operation with the movement required in 1932 and 1933 when the ore was moved from the Milwaukee's dock yard to North Western's dock, North Western ore is hauled in from the west into the first yard, colored red on Exhibit 3. It is classified there, and when ready for acceptance on the dock, it is shoved up and spotted on the dock, which is a direct movement. Ore coming in over the Milwaukee during those years was classified in the Milwaukee yard, colored in green on Exhibit No. 3, and after the ore is classified it was pulled out of the Milwaukee yard and shoved back over the green line to the black line marked E. & L. S., using a portion of the Escanaba and Lake Superior to reach another Y connection with the North Western, the red line, direct on to the dock from that point (Rec. 249-250).

In those movements they handled 30 to 35 cars for the Milwaukee and between 30 and 40 over the North Western. The North Western can and has shoved 60 cars onto its docks at Escanaba, that is not an economical move, as it is too slow and you don't get a chance to make a run for the grades. We make much better time from our yard onto our dock than we do from the Milwaukee yard. It is only about half as far, in the first place, and in the second place, we do not have the difficulty to encounter in making the movement. On the Milwaukee you cannot take a run, on account of the curvatures in using the switches, to help you up on the dock. In making that movement from the Milwaukee to the North Western docks there is a back up, [fol. 256] what is known as a switch back movement. They pull the cars down from the yard and then back around the semi-circle and back down to the North Western docks. The engine never pulls the cars up onto the docks. Even from the North Western yard where there is a straight operation we push the cars because some of the cars placed on the dock are not unloaded for a couple days and they would not want to hold the engine in there during that time.

There are no cross overs between the tracks at the end of the docks (Rec. 250-251).

Based on that comparison the most economical move is from the North Western yard onto the docks. In the course of a year's handling of ore tonnage from that Range, the economies resulting from that operation from the North Western yard would be very substantial (Rec. 250-252).

Cross-examination.

By Mr. Burchmore:

It is a fact that the ore never moves from Palatka mines to Bates yard under the present method of handling ore and it would not move that way if we pooled the ore traffic together via the North Western under this arrangement. The purpose of making this survey was to indicate that we did determine whether or not in pooling this ore, it would be more economical to move it via the North Western or via the Milwaukee through Channing (Rec. 252).

I made a study of the effect of a pooling plan that would contemplate sending all ore through Channing and over the Milwaukee, in 1932 and 1933. I just took into consideration the physical operation on both lines but did not consult with the Escanaba and Lake Superior about it. The Milwaukee did not say that they wanted it that way; they did not say that the pooling on the ore was the thing involved, and we certainly would not want to select a route for the pooling of that ore, if there was another route that was more economically available for doing so. The North Western was tolerant of the idea of letting the Milwaukee [fol. 257] have all the ore traffic if it could save any money in handling it (Rec. 253-256).

We have adopted a plan for the movement of ore from the Gogebic Range to Ashland under which the operations upon the Range and at Ashland were pooled. The Commission has approved this plan and it has been adopted and under it the Soo Line hauls a part of the ore and the North Western hauls part of it and the earnings are divided sixty-forty. Under the plan the shippers are not favoring the Soo Line and giving them more of the percentage. The shippers have nothing to say over which road the tonnage will be handled but both roads are handling ore in road service (Rec. 256).

We have considered such a plan as applied to the Menominee Range-Escanaba business but not seriously because it could not be worked out with any economy. Some of the ore could move more economically through Channing than through Iron Mountain (Rec. 256).

The class J engine is used by the North Western on the line from Antoine to Escanaba; the northern of the two red lines shown on the map Exhibit No. 2 over which it is proposed the loaded ore cars are to move east under the plan, is rated 8700 tons or 60,100 pounds tractive effort. That is a fairly good size engine (Rec. 257).

The published actual tonnage rating of that same type of engine used from Iron River eastward to Antoine, the route over which the ore is hauled from the Iron River District to Antoine is 3,950 tons and from Crystal Falls to the junction with the line handling this ore traffic eastbound 3400 tons, that is, from Crystal Falls to Stager. The actual tonnage ratings on the North Western up to Iron Mountain or Antoine are just about half of what they are east of that junction. Class J engines are commonly used in this ore service (Rec. 257-258).

[fol. 258] It is about 27 miles from Crystal Falls to Antoine or Iron Mountain and from Iron River to Antoine or Iron Mountain is about 38 miles. For those distances the grades result in the actual tonnage ratings given. It is the grades that govern these ratings (Rec. 258).

It is between 3 and 4 miles from Palatka mine to Bates yard where the 2 per cent grade obtains. Ore does not move over that track and such movements have not been proposed (Rec. 259).

To give an example of a mine located on the North Western, where the North Western is hauling ore from the spur where the grade experienced is actually a difficulty and handicap in and of itself, in the handling of the ore, the witness referred to the Bates mine, for instance, where it is necessary to take seven or eight cars at a time to a point on the other side of the hill before they could be sent out. At present that mine is loading from a stock pile and such movements are made until a train of 60 cars is made up. This grade is about 1.83, the same grade as is encountered in moving ore from the other mine to the Milwaukee (Rec. 260-261).

At the present time the North Western is working about 8 switch engines in the Iron River-Crystal Falls area; that depends upon requirements, from 1 to 15. There are other individual industries in the Iron River District having nothing to do with ore traffic, receiving merchandise and shipping forest products.

Some of the spurs to the mines are more difficult to operate than the spurs to other industries in the Iron River District. There are forest products, however, loaded on the mine spurs. If it was not the mine spurs, however, they would be hauled to some other convenient track (Rec. 261-263).

The North Western runs one passenger train east bound and one westbound over the rails from Iron Mountain through Powers and Hermansville and Escanaba, the southernmost of the two red lines shown on Exhibit No. 2. The North Western operates 3 passenger trains in each [fol. 259] direction daily between Escanaba and Powers (Rec. 263-264).

The number of freight trains operating over that southern most line daily depends on the traffic, but in the winter time, not exceeding two in each direction and on a number of days only one in each direction. In the summer time, all of the mine empties move back to the mines over that line. There is no eastbound movement of ore in solid trains over that line, except over a small sector and that which moves in the regularly scheduled trains (Rec. 264).

The northernmost track from Antoine to Sturgeon and Leaber to Escanaba colored in red on Exhibit No. 2 handled eastbound ore trains during the ore shipping season and is used to some extent for forest products during the winter, a very small amount of forest products. They are doubling there. At sometime that line is blocked by snow at the Escanaba end and because long strings of cars are stored at the east end for months at a time. If the North Western went into some other ore pooling plan and had no ore to move from Antoine to Escanaba it would have no use for this northern track. It costs something to maintain that track (Rec. 264-265).

Assembly points for preparing ore for road movement on the North Western are located at Stambaugh, Palatka, Crystal Falls, Stager, Antoine, Vulcan and Sturgeon. The

northern line is not given any attention at all in the winter time and its grade conditions between Sturgeon and Leaber a distance of about 7 miles require use of helper engines on ore traffic (Rec. 265-266).

The Milwaukee Road formerly had tracks down to the Norway District but I have no knowledge of why they withdrew from Norway (Rec. 266).

Redirect examination.

By Mr. Morehouse:

In handling the ore from assembly yards at Iron River, Stambaugh, Palatka and Crystal Falls districts to Iron Mountain, which is an up and down movement, you might [fol. 260] double head the trains between Iron River and Iron Mountain; the line was not constructed for that sort of operation. With one engine you can haul practically 5000 tons between Palatka and Antoine, as far as tractive effort of the locomotive is concerned, but that would not be economical except when you have little if any other traffic to handle there with that one train while it was in the district. It is not a practical tonnage rating. While the engine can pull it up the ruling grade, there are other points that slow the movement down to the extent it would not be economical. The same applies for the ratings shown in the time card between Antoine and Escanaba. We can haul more tonnage than shown on the time table but it isn't economical to haul it, so we don't show it (Rec. 267-268).

We ordinarily try to haul 8700 tons, and have operated ore trains of 100 cars between Antoine and Escanaba with one engine except for the helper between Sturgeon and Leaber. We have handled that tonnage also without a helper by doubling the trains at the top of the hill (Rec. 268).

The movement from the Iron River-Stambaugh, Palatka and Crystal Falls District to Iron Mountain is in general a down hill movement. The elevation at Iron Mountain is lower than it is at any of those points. Whatever grade there may be in the way of a so-called ruling grade is at some point coming out of a river valley, a drainage district (Rec. 269).

The three passenger trains I mentioned as running in each direction each day between Powers and Escanaba: All

but one of these in each direction run over the line that goes south from Powers down through Menominee and Marinette as shown on Exhibit No. 2. One operates in each direction only between Powers and Escanaba on that [fol. 261] line. That train also operates between Powers and Iron River terminating at Escanaba. It is 22 miles from Escanaba to Powers and these trains take from 35 to 46 minutes for the run (Rec. 269-270).

Even if the North Western had no use for the northerly line, if no ore traffic were being moved there we might be required to keep enough of this line in service to take care of the forest products (Rec. 270).

Recross-examination.

By Mr. Boone:

It is my understanding that if the pooling arrangement is approved and the organizations decide that a certain number of the Milwaukee's employees shall be assigned to the ore service handled by the North Western that will be recognized by the North Western. I don't know, I could not state definitely but it was my understanding that the railroads themselves would not settle this thing; that the men would have to settle it; we would be glad to furnish our own men if the Milwaukee men did not want to come over there, or I suppose we would be obliged to allow the Milwaukee men to come over and take their proportion of the work upon some basis agreed upon between the organizations (Rec. 270-271).

By Mr. Burchmore:

So far as this ore traffic is concerned, all of the rails and tracks and lines and spurs of the North Western involved are in Michigan, excepting a part of the main line between Stager and Iron Mountain, 10 or 15 miles, where it crosses over into Wisconsin (Rec. 272).

[fol. 262] C. F. Balch, being first duly sworn, testified as follows:

Direct examination.

By Mr. Morehouse:

I am employed by the Chicago and North Western Railway as its statistician.

Mr. Burchmore: We will admit the qualifications of Mr. Balch, as an accountant.

The Witness: I have prepared an exhibit setting forth certain financial and other statistics reflecting the results of the Chicago and North Western Railway Company's operations during the past few years. (Said exhibit received in evidence as Exhibit No. 9.) Page one of the exhibit is the income account statement for the year ended December 31, 1934 and is almost an exact copy of the first page of the stockholders' report for this year. The page shows total operating revenues of $75,000,000 plus net railway operating income of $5,202,104.56 and net deficit for the year of $8,276,193.80 (Rec. 273-274).

On page number 2, I have shown the net railway operating income for the years 1929 to 1934, inclusive, giving the total net operating railway income and the ratio to 1929, which illustrates the decline in the earning power of the railway. The net railway operating income is the amount left out of revenues after paying operating expenses, taxes, and operating rents, which leave the amount available for the payment of interest on the funded debt, dividends on the stock or other corporate expenses, and below this, I have shown the interest charges only for the year 1934, that on the funded debt and the refunded debt which is really the short loans which are outstanding at the end of the year 1934, the total interest charges were $16,761,945.00 (Rec. 274).

It will be seen that the net railway operating income fell far short of paying the interest charges in the last few years.

Now, on page 3 I have shown the indications which relate to the decline in traffic, the transportation train miles of the passenger service, the transportation of train miles into freight service and the traffic units which represent the

traffic transported, the passengers one mile plus the tons one mile, showing a decline over this period of 43.68 per cent (Rec. 274-275).

[fol. 263] In the next field, I have shown the taxes paid by the company which show a decline from 100 per cent to 59.64 per cent, or a decrease of 40.36 per cent (Rec. 275).

Then, in the next field, the gross earnings for the six years ending December 31, 1934, those for 1934 being 49.05 per cent of those for the year 1929 (Rec. 275).

On page number 4, I have shown the figures which indicate what it has been necessary for us to do in order to meet the conditions arising from the curtailed revenues, first, the maintenance of way and structures, a decrease from 1929 of $11,223,249.00, or 51.01 per cent. The maintenance of equipment declined from $29,000,000.00 to $15,000,000.00 or an exact figure of $13,008,222.00, a decline of 45.58 per cent. The total of the two items show- a decline from 1929 of 47.95 per cent (Rec. 275).

The number of employees shown in the lower field has decreased from 45,358 in 1929 to 24,400 in 1934, a decrease of 20,958 or 46.21 per cent (Rec. 275).

The wages paid for the operation of the railway has declined from $74,000,000.00 in 1929 to $37,000,000.00 in 1934, a decrease of $37,449,437.00, or 50.19 per cent (Rec. 275).

On page number 5, I have shown in the upper field the net corporate income after paying interest and fixed charges but no dividends. In 1929, there was $15,599,056.00 available for this purpose. In 1930, there was $8,342,191.00. In 1931, there was a deficit of $6,034,125.00 (Rec. 275-276).

I will not repeat all the figures shown on the exhibit. There were deficits for the other three years. Now, this made it necessary for us to borrow as temporary loans in the year 1931, with this deficit of $6,000,000.00; we borrowed $10,000,000.00 from the banks. That was before the R. F. C. was in operation. In 1932, we borrowed from the R. F. C. $17,000,000.00 and we paid off $5,000,000.00 on the bank loan, leaving $5;000,000.00 outstanding, making a total short loans to these two sources of $22,039,93.00. Decem-
[fol. 264] ber 31, 1933, we borrowed again from the R. F. C. and the bank loan is still outstanding, a total of $36,815,133.00; and at the close of 1934, we had outstanding as indicated here a total of $32,302,933.00, as short loans. As to each one of those four sections in that last field, the figure in

the right hand column shows the total amount of short loans outstanding at the end of the year (Rec. 276).

Now, I should explain the reason why 1934 is less than 1933, but the short loans for 1933 included moneys that we had borrowed for refunding purposes which we had extended by the R. F. C., so that there is $17,000,000.00 of that character that now shows as a three-year loan in the long term debt, and the $32,000,000.00, to that might be added the $17,000,000.00 which we owe as long term debt to the R. F. C., making a total indebtedness to the banks and the government of $49,000,000.00 which illustrates the financial difficulties we have experienced and the way that we have found necessary to meet them (Rec. 276-277).

Cross-examination.

By Mr. Burchmore:

The total loans the North Western now have from the government, long and short term, approximate $43,000,000.00 or $44,000,000.00 (Rec. 277-278).

I was a witness in the so-called Adriatic cases where the Commission fixed the rates on iron ore. I there gave testimony some ten years ago relative to maintenance costs and the costs of transporting ore. I am not here offering any figures going to the question of costs or economies (Rec. 278).

Redirect examination.

By Mr. Morehouse:

The only purpose of my offer here is to show the railroad's condition and the need for economies (Rec. 278).

[fol. 265] Gunner Torres, recalled as a witness, having been previously sworn, testified further as follows:

Cross-examination (resumed):

I was first asked by our officers to make a study of the cost of repairing our dock on August 29, 1934. The request was made by my superior officer, Mr. Penfield, engineer of maintenance of way, as a part of the routine work of the year (Rec.280).

Approximately $17,850 of the estimated sum of $60,000 for the repair of the dock was for material, without transportation (Rec. 281).

[fol. 266] GEORGE N. HARDER, being first duly sworn, testified as follows:

Direct examination.

By Mr. Burchmore:

I am General Manager of the Escanaba & Lake Superior Railroad Company. I have been connected with that company since January 1, 1924.

The first construction of the Escanaba and Lake Superior Railroad Company was previous to 1900, reaching as far as Watson, a distance of thirty-one miles, running through Delta and Marquette counties. It was built primarily as a logging railroad for the purpose of transporting forest products (Rec. 281-282).

An arrangement was made for the extension of that railroad when the Milwaukee entered into an agreement with it for the transportation of iron ore from their connection with us at Channing eastbound to Escanaba on a wheelage basis.

The Escanaba and Lake Superior Railroad had no line from Channing to Escanaba at that time, but the contract itself contained provisions for its construction (Rec. 282).

Under the contract entered into in 1900 a line was built from Watson to Channing, about thirty-two miles, by the Escanaba and Lake Superior. It was a heavier type road than necessarily used for our locomotives (Rec. 282-283).

The Milwaukee Railroad has used this line up to the present time for the transportation of iron ore with their trains and crews. The arrangement also covered coal westbound for company use and for mines they served as well as dock material or construction material the Milwaukee might require in its operations at Escanaba (Rec. 283).

The first agreement expired December 31, 1920 when a new agreement was made for a period of thirty years, expiring January 1, 1951, very similar to the original agreement with some modifications (Rec. 283-284).

Previous to 1900, I am informed that the Milwaukee handled ore traffic over the Soo Line in connection with Soo Line docks at Gladstone, connecting with the Soo [fol. 267] Line at Champion. After this agreement of 1906, the Milwaukee discontinued that route (Rec. 284).

Since I have been in charge of the Escanaba and Lake Superior the Milwaukee has used this road for the transportation of all its iron ore from the Menominee Range to Escanaba and in accordance with the provisions of the contract. To the best of my knowledge the contract has been lived up to on both sides. (Rec. 284).

The Escanaba and Lake Superior is engaged in the general transportation of all merchandise. It holds itself out as a common carrier of freight and passengers and is owned by stockholders. The stock is closely held, and as indicated by the annual reports to the Interstate Commerce Commission it is not controlled by any other corporation (Rec. 285).

In its valuation report of the Escanaba and Lake Superior Railroad, Volume 121, I. C. C. 454-457, the Commission states "One of the principal industries served is the Escanaba River Company, a lumber company controlled by the same interests that control the carrier." That statement is not correct. One of the prominent industries served by the railroad is the I. Stevenson Company, a lumber company, but that concern does not own or control the road. The only extent of any community of interest between the stockholders of that company and the railroad is a duplication of stock owners in both companies, there are stockholders in both companies having no connection or interest with the other (Rec. 285-286).

The statement in the Commission's report is erroneous. There was no company at Wells by the name of Escanaba River Company. That was the predecessor of the Escanaba and Lake Superior Railroad Company. The I. Stevenson Company is in the lumber business and formerly held extensive holdings along the Escanaba and Lake Superior Railroad. The virgin timber has practically all been cut and at present that lumber company receives ninety per cent of its logs off the Northwestern side of Little Lake or off of White Fish branch (Rec. 287-288).

The Escanaba and Lake Superior runs two trains each way each week day. One is a motor train, a motor car carrying mail, express and baggage between Escanaba and [fol. 268] Wells, as far as Ralph, a distance of forty-nine miles and returns in the afternoon. There is no demand for running that train clear to Channing. The second train is a mixed train leaving Wells at five o'clock in

the afternoon, going to Channing and returning about one A. M. (Rec. 288).

The night train handles all kinds of traffic, freight from the industries we serve, principally paper, chemicals, pig iron and lumber and forest products. It also handles all of the freight interchanged with the Milwaukee Road at Channing of which there is a substantial volume (Rec. 288-289).

As to future prospects as the forest becomes denuded, our tonnage will be very materially decreased. It fact it is decreased at present. The I. Stevenson Company, the largest owner of forest land tributary to the Escanaba and Lake Superior Railroad have less than six million feet of virgin timber available to come to those tracks and fifty per cent of that will not be cut by that company but by settlers who will buy these lands. Six million feet represents only six months' cutting for the saw mill (Rec. 289-290).

As the larger forest resources become exhausted, there will be some cutting by settlers or small land holders. The country is developing agriculturally only to a very small extent and the volume of second growth timber and the ties and pulp wood and agricultural products will not afford sufficient revenue to make this railroad self-sustaining (Rec. 290).

The revenue from the ore business handled by the Milwaukee under its trackage rights over the Escanaba and Lake Superior is a very important source of life to this railroad (Rec. 290).

The first information I had of the proposed pooling plan was gossip heard in June, 1934. I had no actual knowledge prior to March 26, 1935. When this rumor reached us I reported it to a meeting of our stockholders held shortly thereafter and reported it to our directors. [fol. 269] On June 22, 1934 I called on Mr. Scandrett, President of the Milwaukee road and had a brief conference with Mr. Gillick (Rec. 290-292).

Mr. Gillick, Vice President in charge of operations, did not seem to know much about it, Mr. Scandrett told me there had been some thought given to pooling the ore, but they were just considering it and no definite decision reached and he did not know when there would be, if any (Rec. 291-292).

I called on Mr. Scandrett's office on October 23rd, but he was out of the city. Mr. Gillick and Mr. Harsted, General Manager, were also out. Then, I called on Mr. E. B. Finegan, who told me the same as Mr. Gillick had on my previous call, that this was a matter being handled between Mr. Sargent and Mr. Scandrett and he knew nothing about it (Rec. 292-293).

My next interview was with Mr. Scandrett on November 20, 1934 and was told negotiations were being considered but little progress made and he had no information to give me (Rec. 293).

On January 16, 1935 I saw Mr. Scandrett and received the same information. At that time I told him these rumors continued in our territory and I would like to have some information. We were interested because of our tie renewal program for this year and he said no definite decision had been reached and when it was it would have to be referred to the Interstate Commerce Commission, a long drawn out process, and he thought we were perfectly safe in going ahead with our tie renewal program, to purchase ties because the Milwaukee no doubt would use our tracks during the season of 1935, and ties have since been purchased. I had another consultation with the Milwaukee officials after the application was filed, but previous to my having seen it (Rec. 293-294).

On March 15th, I received a letter dated at Channing, Michigan, March 14th, signed by Mr. R. J. Tobin, Vice Chairman, Brotherhood of Railway Trainmen, inviting me to attend a meeting to be held at Channing on March 18th, [fol. 270] to consider the proposed pooling of iron ore from the Menominee Range. This letter did not indicate that any application had been made to the Commission. An enclosure marked for identification as Exhibit No. 8 came with this letter, the body of which read as follows:

"I am enclosing a letter signed by the general chairman of the four transportation brotherhoods, relative to an ore meeting held in Chicago March 4th, which is self explanatory.

"We are holding a meeting in Channing Monday evening at 7:30 P. M. It is our intention to protest this arrangement vigorously to the Utilities Commission of the state of Michigan and if necessary, to the Federal Coordinator, Eastman.

"You or your representative and/or any other officer or employee of the E. & L. S. Ry. are urged and invited to attend this meeting. Please advise if you will be present and oblige." (Rec. 294-296).

I did not attend this suggested meeting at Channing, and made inquiry and was told that none of the employees of the Escanaba and Lake Superior Railroad were present (Rec. 296).

I next heard of this application on March 20th when our superintendent Mr. George Brown, handed me an excerpt from the Daily Traffic World dated March 18th, which in substance reported that the North Western and the Milwaukee had filed an application. He had received this in Chicago on March 19th (Rec. 297).

Mr. Burchmore: I believe, Mr. Examiner, that the application is stamped in the Commission files as filed March 12th, and I ask that the record may show that it was transmitted to the Commission, with the letter dated March 11th, signed by Mr. Morehouse (Rec. 297).

The Witness: I first received a copy of this application on March 26th, and employed counsel to represent us in this case on the same day (Rec. 297).

Since the meeting on January 16th, I had a conference with Mr. Scandrett on April 2nd which I sought by letter dated March 23. During all this time I have never been [fol. 271] consulted by the Milwaukee or Northwestern officials with regard to our consent or approval or participation in any form of pooling arrangement (Rec. 297-298).

The Escanaba and Lake Superior at no time requested or suggested to the brotherhood or the people of Channing that they intervene in and take an interest in this matter (Rec. 298).

The Escanaba and Lake Superior Railroad Company is opposed to this pooling arrangement. In my opinion its adoption would be very seriously detrimental to it (Rec. 298-299).

I very carefully examined the copy of the contract as attached to the application itself, but have not seen the one now filed with the Commission as Exhibit No. 1 (Rec. 299).

If the Milwaukee discontinues operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad as provided in paragraph 51 of the proposed contract, it will substantially reduce the revenue of

the Escanaba and Lake Superior. Under paragraph 52 it is provided that by reason of the arrangement proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic it would interchange with the Escanaba and Lake Superior Railroad if the arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if the arrangement is put into effect. The gaining of traffic by the North Western and the losing of it by the Milwaukee would have a very material effect upon the revenue of the Escanaba and Lake Superior Railroad on account of the divisions (Rec. 299-300).

Paragraph 53 provides "Should the North Western subsequent to the date this contract is entered into acquire the trackage of the Escanaba and Lake Superior Railroad." We have given no consideration to the matter of selling our trackage to the North Western. Our trackage would be less valuable and the earnings would be less than today if the [fol. 272] Milwaukee Road were not using it (Rec. 300).

We have never given any consideration to selling our terminals to the North Western as suggested in paragraph 54 of the contract. The North Western has never asked us to make them a price (Rec. 300-301).

A route composed of the Milwaukee Railroad and the North Western via Iron Mountain, as proposed in paragraph 55 of the contract, Exhibit No. 1, is not one in which the Escanaba and Lake Superior would have any participation except as to industries located exclusively on its tracks in which event it would be the delivering carrier. In that event it would depend upon the commodity whether the Escanaba and Lake Superior would receive a switching charge or participate in the through rate. The Escanaba and Lake Superior is not a bridge line on any through traffic today, and I see no possibility of that occurring under ordinary conditions, since there are three connections or three trunk lines in the upper peninsula of Michigan, the Milwaukee, the North Western and the Soo Line, who have direct connections with each other. As a result the Escanaba and Lake Superior is not an intermediate carrier and issues no tariffs covering intermediate service. There are no instances where the Milwaukee hands it business at Channing to be hauled to Wells or Escanaba to be turned over to the North Western or Soo Line (Rec. 301-302).

It is a very serious threat to our revenues and volume of traffic for two of our principal connections to get together and agree on joint rates and through routes that will not utilize our line. There is no respect in which paragraph 55 could be of affirmative benefit to the Escanaba and Lake Superior Railroad. If the connection at Iron Mountain is established, we would not receive any of the freight destined to Escanaba to industries which have North Western or joint track connection (Rec. 302).

[fol. 273] Exhibit No. 8 was received in evidence over objection of counsel (Rec. 302-305).

Cross-examination.

By Mr. Sutherland:

When I used the term revenues in my testimony, I was using it in relation to our entire income. The plan would reduce the rent and maintenance cost paid to the Escanaba and Lake Superior Railroad by the Milwaukee Railroad. The maintenance cost, of course, would be lessened, to some extent, if the Milwaukee use were eliminated (Rec. 306).

Our trains and commodities are not as heavy as the ore that moves. We have light tonnage and slow-speed trains. Under the pooling plan the Escanaba & Lake Superior Railroad will still have the privilege of interchanging the traffic with the Milwaukee at Channing the same as it does now and has done in the past. It would make no difference in that respect, so far as the abilities of the two companies are concerned (Rec. 307).

The line was originally constructed as a logging road started out from Wells. At that time, there was virgin forest up through that territory except around the towns that had been established. The principal tonnage now originating on the line is forest products. We occasionally ship posts and ties over the Milwaukee, delivering them to it at Channing, and large quantities of lumber (Rec. 307-8).

It is the ordinary history of logging roads that after the forest products have disappeared, business also disappears from the rails. A number of pieces of railroad that penetrated into the logging country have been abandoned. We have some farming along our railroad. It is a negligible amount, but it is increasing each year. We very occasionally get a car of live stock. Hay and potatoes originating

at stations on our line starting at Groos, are two chief agricultural products. We have had some as far west as Northland, but if we had to depend upon anything of an agricultural nature for our traffic, our business would soon come to an end (Rec. 309-310).

We object because if the pooling arrangement goes into effect, the Milwaukee will pay less money to the Escanaba and Lake Superior than it has in the past. I have no opinion as to whether or not the pooling arrangement will save money for the Milwaukee. Even though there was a substantial saving to the Milwaukee, there are other angles that should be considered. Our company should be considered and the public should be considered (Rec. 310-311).

[fol. 274] Traffic of the Escanaba and Lake Superior Railroad will not support that railroad without the ore traffic and if it had not been for the Milwaukee we would not have this railroad to support. The Escanaba and Lake Superior Railroad has paid for itself reasonably well. It has paid dividends with one or two exceptions and has paid off some of its debts (Rec. 311-312).

Q. You said something about differences of divisions between your arrangement with the Milwaukee and the North Western. Is there any substantial difference on your divisions?

Mr. Burchmore: I object to any question about divisions.

Mr. Sutherland: He spoke about divisions.

Mr. Burchmore: He spoke about them in a sense, yes, but not what they are and so forth, and I certainly object to any questioning and discussion as to divisions between the different railroads. It is not a matter at all germane to this proceeding.

The Witness: Our division with the Milwaukee Road is thirty-three per cent and with the North Western it is thirty per cent on the traffic to certain territory (Rec. 313).

By Mr. Morehouse:

In my reference to divisions, I simply refer to the situation where to certain territory our road gets three and one-third per cent greater division from the Milwaukee than it does from the North Western, coupled with the fact that it went via the North Western from industries located on the North Western, or where they have joint track connection

at Escanaba, it would naturally go by the North Western and we would not touch it, so that the division was not the only disadvantage. In the situations I mentioned, the industries I speak of are located on the North Western line, as well as on the Escanaba & Lake Superior, and those industries might ship via the North Western direct without touching the Escanaba & Lake Superior (Rec. 314). They can do that now under existing conditions, and possibly the same considerations that would move them to ship over our line now instead of the North Western would obtain in the future. I do not know whether there is anything about the pooling of ore that would change that one way or the other.

Q. Well, can't you think of any reason in connection with the mere fact that the ore was moving the other way that would change that situation, can you?

A. A shipper likewise can have the privilege of determining via which route his tonnage will move rather than being dictated to, when there is an artery through some other manner.

[fol. 275] Q. Yes, and the shippers of these industries that are served jointly by the North Western and the Escanaba and Lake Superior in the Escanaba district would still have that privilege in the future, just as they have had it in the past?

A. I assume they would (Rec. 314-315).

The Escanaba and Lake Superior has made a satisfactory showing as to earnings during the past ten years. During the period from 1923 to the present time the Escanaba and Lake Superior retired all of its funded debt (Rec. 316-317).

Redirect examination.

By Mr. Burchmore:

The west thirty miles of the Escanaba and Lake Superior from Watson to Channing was constructed for the transportation of iron ore for the Milwaukee Road and at its instance and request. That line was of substantially heavier construction than would be required for a logging road. It was designed for the ore traffic. We do not seek charity of [fol. 276] the Commission but are proud of the fact that we have not been burdened with a heavy debt (Rec. 318-319).

Recross examination.

By Mr. Sutherland:

In the last ten years the Escanaba and Lake Superior has abandoned approximately seventy miles of temporary logging branches, transferred from one location to another. These extended out into the timber, and as the timber was cut the branches were moved out into some other location (Rec. 319-320).

The I. Stevenson Company does not control the Escanaba and Lake Superior nor own one share of stock in it. Some individuals who own stock in that company also own stock in the Escanaba and Lake Superior (Rec. 320).

Mr. Morehouse: That is all the testimony for applicants.

[fol. 277] H. M. Doyne, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Burchmore:

I am a civil engineer, a partner in and the head of a firm of consulting engineers of St. Louis, Missouri, known as C. E. Smith & Company.

Mr. C. E. Smith was formerly the head of the organization with which I am associated. In 1928 he severed his connection to become vice president of the New York, New Haven and Hartford Railroad. Mr. Smith had many years of experience as an engineer in private practice and prior to that he was associated with the Missouri Pacific Railroad for 8 or 10 years (Rec. 324).

I attended Cornell University and Cooper Union Institute in New York City and received a degree as civil engineer. Since my association with C. E. Smith Company in 1916, a large part of my work has been in connection with railroad engineering, including construction of a number of short line railroads, railroad terminal construction work, investigation and report on railroad projects, appraisals, valuations by the Interstate Commerce Commission and reports for purchase and financing. I have conducted special studies of railroad operations, construction and terminal railroad situations for such public authority as the City of St. Louis,

Missouri, and East St. Louis, and the Chambers of Commerce of those two communities in a report on the railroad terminal improvements at St. Louis; the Louisiana Public Service Commission, making the report on improvements of passenger and freight terminal facilities at New Orleans and the Canadian Pacific Railroad employed us to make a report on the improved unified passenger terminals at Montreal. I made studies also for the subway commission for the city of New York, have had general experience in connection with valuation and appraisal of railroad properties, and our office has been the engineering headquarters for some 15 or 20 short line railroads who did not have their own engineering forces (Rec. 325-326).

I have made particular studies of the question of going value and utility of railroads to serve the public. I was recently employed to make an inspection of the Escanaba and Lake Superior Railroad. The line is well located for the traffic passing over it and well constructed for that traffic. The [fol. 278] line and surface from the observations I made of it are both good and because of its lack of heavy grades and long grades is easy to operate, considering the fact that the heavy movement is from the West to the East (Rec. 326-327).

On March 28, I made an inspection riding in a motor car, a regular car used in passenger service and with an observation front window. I got out of the car every 3 miles, making 20 or 21 stops, and walked varying distances along the tracks, from 2 to 6 or 700 feet and inspected the condition of the road beds and the tracks and, of course, had occasion to observe the conditions along the line while riding. The line is about sixty-three and a half miles long and is a single-track road with a number of passing tracks to facilitate movement in both directions. Of the total distance, about forty-five and a half miles are tangent tracks, the remainder being curved track. I think the maximum curve is four degrees, as I recall, looking over the alignment maps. The grades are light, the maximum uphill grade from west to east is 7/10 per cent for about two thousand feet of length and the maximum westbound grade, which is the direction of light movement is about 1 per cent. About twelve and a half miles of the line is level, that is, the track is level, and six miles is on the upgrade and forty-five miles on the downgrade, considering the movement from west to east. The

traffic is mostly loaded eastbound due to the heavy ore movement (Rec. 327-328).

The sum total of the upgrades, that is, in the form of rise, is 173 feet of lift, going from the Channing end to Escanaba and in the same direction, the total descending track is a fall of 953 feet. In other words the sum of all the downgrades represent 953 feet of fall and 173 feet represent the sum total of all the ascending track. The ties are very good and fully tie plated and the track well anchored and the ballast in good condition and ample to keep the track in good line and surface (Rec. 328-329).

The rail is almost all 90 pound, with the exception of about five miles of 75 pound rail, and the latter is scattered, well distributed over the line. The rail joints are very good and [fol. 279] even and tight, that is, they are not battered, but there was not much opening between the adjoining rails and the joints. They were level and smooth and the car rode very evenly over the track at the time, even at speeds of 40 miles an hour (Rec. 329).

There are about 18 communities distributed over the line, all of them depending on this road, from my observation, for passenger and freight and probably express service and mail. The principal freight handled appears to be forest products, mine products and some agricultural products (Rec. 329-330).

On the following day, March 29, I inspected the line known as the Escanaba, Iron Mountain and Western, a North Western Railroad subsidiary. In the last few days I have examined a profile of that line as filed with the Interstate Commerce Commission. At the time of my inspection a rather condensed profile was given me by one of the representatives of the North Western (Rec. 330).

The Escanaba, Iron Mountain and Western is also a single track road, and the portion I inspected extended from Antoine to Escanaba. It had not been operated generally since the close of the last ore shipping season, except at one end which had been used to some extent. It was in fair condition but not in as good condition as the line of the Escanaba and Lake Superior. It is about 52½ miles long, single track with a number of passing tracks at different locations and I learned that the movement was almost entirely eastbound during the ore shipping season. This line is the most northernmost of the two red lines shown on the map Exhibit No. 2 (Rec. 330-331).

The grade situation on this road is much more severe than on the Escanaba and Lake Superior, there being a long uphill pull over about seven miles in the vicinity of Leaber, or I think beginning of that uphill grade is at Appleton Junction. The rise in that distance is about 138 feet. There is, you might say a break in that grade for about a mile where the track is substantially level, but despite that fact, the easterly five miles of that stretch is an [fol. 280] uphill grade where the rise is about 115 feet in that five miles (Rec. 331).

My recollection is that there is nothing to stop for in that upgrade, but it is a long pull. In fact, the inquiry I made at the time brought out the fact that helper engine service is needed to get the cars or the train over that hill as a regular operation. The rails are mostly ninety pound. There is about ten or twelve miles of 100 pound rail at the westerly end. The ties are in fair condition, although they are not fully tie plated and the track is not anchored as well as is the track of the Escanaba and Lake Superior and there was considerable evidence of deferred maintenance along this line. The line and surface was not as good as on the Escanaba and Lake Superior. The track was in rougher condition for riding, many of the joints were low and there was considerable evidence of battered joints. However, the line was in, I would say generally speaking, a fair operating condition at the time I saw it, although it had not been operated over for some months.

The line is in a safe condition and suitable for hauling loaded ore trains eastbound (Rec. 331-332).

I observed no communities along that line which depended on it. The largest, was the town of Tesch, which is served by another railroad. There are several junctions along the line or sidings where forest products are loaded out, but no real development of communities (Rec. 332).

(Map Exhibit No. 10 was offered and received in evidence at this point with the understanding that to the extent this map differed from the large detail map applicants had submitted as Exhibit No. 4 it was agreed that Exhibit No. 4 was the correct representation. It was also agreed that Exhibit No. 2 was correct and that applicants maps in general were correct so far as they went and that

Exhibit No. 10 showed the environment of the Escanaba and Lake Superior Railroad) (Rec. 333-334).

The Escanaba Iron Mountain and Western Railroad line rather closely parallels another line of the North Western going through Powers. I did not travel over the latter line (Rec. 334).

From my experience, in judging the value of a railroad [fol. 281] and its utility and going concern value, from the brief investigation I made, and considering both the Escanaba and Lake Superior and the Escanaba Iron Mountain and Western, it would appear to me that the Escanaba and Lake Superior serves a much better purpose and renders a greater public service by reason of the fact that first of all, it operates the year around; that its service includes not only the handling of iron ore, but in addition it serves a community which has grown up and developed along the railroad depending on it for general freight, passenger, mail and express service; that by reason of that service and the location of that line through the territory, it does have a value of greater —, considering its earning possibilities than does the line of the Escanaba, Iron Mountain and Western which operates primarily only during the ore shipping season, with its operation in one direction and with very little other traffic and with practically no communities depending on it for service and from which it may draw additional revenues (Rec. 334-335).

From the general examination I made of the revenues and operating expenses and income, without attempting to analyze them in detail, it would appear that the Escanaba and Lake Superior Railroad would not be a self supporting line without the revenue or income afforded by the ore traffic. It is my general observation that there would be considerable inconvenience to the communities along the line of the Escanaba and Lake Superior if the road were abandoned as a result of the failure to be self supporting with a loss of this ore traffic now moving over it. I have seen the development there such as it is, and there is con- [fol. 282] siderable investment along that line by the communities. If they were deprived of this railroad service, they would be materially handicapped and suffer some loss. I had not made an intensive study of this because the time was too short for the purpose. I examined the record of the company as to tonnages and character of traffic and

we stopped along the line at various communities and I had an opportunity to observe the nature of the development and from inquiries as to the kind of service that was being rendered, and with that information I was able to get some idea of what the effect might be on the communities if this line would cease to function. I did not get into the matter and the number and conditions of public highways that could be used in case this road were abandoned.

(The testimony abstracted in this paragraph was objected to by counsel for the North Western but was allowed to stand for what it might be worth by the presiding examiner) (Rec. 335-339).

Cross-examination.

By Mr. Morehouse:

I would not be positive whether the maximum curvature on the Escanaba and Lake Superior is six degrees or four. I looked over the alinement maps and my recollection is four degrees was the sharpest curve I saw. My observation after riding over the line, was that the curvature on both lines was about the same; they have about the same amount of curves per mile of track. There is very little difference there, and for that reason I made no particular examination on that phase of it at the time I was there (Rec. 340).

The Escanaba, Iron Mountain and Western line was in fairly good operating condition when I went over it. Taking into consideration that a part of the Escanaba, Iron Mountain and Western had not been operated and maintained during the winter I naturally expect that there would be some maintenance on it in the near future. There was evidence of considerable deferred maintenance, which would be no longer than period of a few months. I would think the line would be put in better condition when the ore operating season arrives (Rec. 340-341).

I think there are 18 communities along the Escanaba and [fol. 283] Lake Superior. I stopped at them and at a few places inquired as to the number of inhabitants. I did not attempt to get that for all of the communities because I thought we were going to have more time to go into it thoroughly. While small all of these communities had a general store and immediately adjacent to the station there were several residence buildings and at a number of those

I saw they had a school and church building. At Lambert about five miles out from Escanaba is a small community of several residences. There are no industries there. The only industries I saw along the line after leaving Groos were some of the lumber loading spurs. They are similar to the ones on the Escanaba, Iron Mountain and Western excepting there were more of them, and there seemed to be more activity. Then there was another community, at Chandler, of a similar nature and the same at Salva. At Cornell which was a little larger than these others, in addition to the general store, there was a church and a school building and it seemed to be a community surrounded by agricultural development. North of the road there was considerable cleared land. The rest of the country, generally speaking, is cut over land. What I refer to was a clear space surrounded by stumpage. The cleared land at Cornell was more than just a cleared space. It was considerable—you could see it out for a distance beyond the immediate right of way. I would not venture any opinion upon the number of farms as I was not familiar with it (Rec. 343-344).

At Woodlawn, there was another community of similar development to that at Cornell having a general store and a number of houses. There was an unloading crane for handling material from the cars to trucks. I do not know whether there was a church or school. Hendricks has a number of small homes, a filling station, a loading spur for handling team tracks business. Dewey Hill has a small development, several homes, a store and a gas filling station. Watson, the next town, had a post office and a small community with a number of homes. As near as I recall it all these communities had anywhere from five to ten or twelve homes immediately adjacent to the station, that is, within sight. I did not get back off the right of way [fol. 284] (Rec. 343-345).

Mashek was the next town where there were also several small homes, four or five adjacent to the station, Northland, the next station, is a much larger community, one of the largest along the line but I have no information on population. The town of Ralph is one of the larger communities that has stores and school and a church and what appears to be a much more active development than these other communities. At Turner there is a community de-

velopment of several homes and a school house. I cannot say how many homes but more than two or three, perhaps five (Rec. 345-347).

The termini at Wells and Channing are much larger of course (Rec. 345, 348).

Along this line at various points there are a considerable number of cedar swamps, low lying land. I made inquiries as to whether or not that right of way was subject to overflow and was told that it was not (Rec. 348).

I would not want to express an opinion as to whether or not a large amount of this territory adjacent to this line is not susceptible of agricultural development (Rec. 348).

As to whether there were forest products along the line of the Escanaba, Iron Mountain and Western to come out in the future, the only investigation I made was to look over a map which I found in their offices showing timber land in that vicinity and in the vicinity of both those roads, and that indicated that the Escanaba, Iron Mountain and Western passed along the very edge of most of the timber land around there and most of the land seemed to be centered or equally divided on both sides of the Escanaba and Lake Superior Railroad. That is to say it was in the southern edge of the timber area in that part of the country, or what was then the timber area. I do not know the date of that map, but it was of recent preparation (Rec. 348-349).

From just riding over both roads I am not able to say as to which could produce more active agricultural activity, the Escanaba, Iron Mountain and Western or the Escanaba and Lake Superior. I would say I saw more cleared land at several places along the Escanaba, Iron Mountain and Western, than along the Escanaba and Lake Superior, but [fol. 285] whether the extent of it was more or not I would not know (Rec. 350).

By Mr. Sutherland:

I did not make the positive statement that the Escanaba and Lake Superior Railroad was not a self-supporting line. I said from the examination I made of it, of its earnings, income and operating expenses, it would appear that it would not be self-supporting if it lost this Milwaukee Iron Ore traffic (Rec. 350-351).

Q. By Mr. Sutherland: If if developed that the iron ore traffic could be moved by the Milwaukee much more economi-

cally on another route, would it be your opinion, notwithstanding that fact, that it should still be used to support the Escanaba and Lake Superior?

A. Well, my judgment would be this, that before making a drastic change in operations that would seriously effect other interests, particularly the public, I think you would have to investigate that angle of it before deciding whether it would be a proper thing to do.

Q. Well, I am assuming, I am assuming that we have investigated this plan which we are here proposing today, we at least have found that it contains various economies; now, if you don't object to my including that assumption in the question which I did, I would like to have you answer it, based on that assumption.

A. I think before you could reach a conclusion, you would have to weigh those advantages to the Milwaukee Railroad against the offsetting disadvantages of the general public. That is what I mean, and I have not seen anything that bears on that specifically.

Q. All right, what did you discover in the way of disadvantages to the public.

A. I mentioned in a general way that the public might be left without the service it now has and the communities along the line might have to suffer a very large—what to them would be a very large loss by reason of it.

Q. But the Milwaukee Railroad does not and never has served those communities, has it?

A. But the railroad——

Q. You understand that, don't you?

A. The Milwaukee as such, I understand, has not, but the railroad has by reason of the arrangements which the Milwaukee made with the owners of the railroad.

[fol. 286] Q. Yes, Now, if there has been developed a plan which would move that ore at much less cost to the Milwaukee Railroad than it is now being moved, are you still of the opinion that it should be kept where it is?

A. Well, I would not want to——

Q. To the Milwaukee's disadvantage?

A. Before I would answer yes or no, I would want to have all the facts bearing on the matter before me, and without that, I do not believe I can answer it.

Q. You don't care to answer it based on my assumption that these executives have satisfied themselves that there are economies available?

A. I understand—they have, at least as I heard it, to the effect that the officials of the Milwaukee feel there are econmies in the field but have made no investigation as to the effect of that change in operation on the other interests involved, that is, either the Escanaba and Lake Superior Railroad or the general public (Rec. 351-353).

From my experience I do not believe there is a hard and fast rule from which one could say that notwithstanding that there might be economical advantages to the Milwaukee Road in this pooling arrangement it should not be permitted to enjoy that advantage. I think that the facts themselves must warrant the ultimate decision, and I think there have been cases where changes in methods of operation that would result in inconvenience and general harm to the community have been disapproved and frowned upon by the Commission. At this time, without making a fuller investigation, I would say I have no definite opinion as to whether this pooling should be permitted or not. I am not testifying along those lines and on direct examination did not express any opinion about that (Rec. 353-355).

When I made my inspection trip over the Escanaba, Iron Mountain and Western, I did not see any villages located along that line. The country was of the same general character as along *as along* the Escanaba and Lake Superior (Rec. 355-356).

By Mr. Morehouse:

The revenue figures which I examined of the Escanaba [fol. 287] and Lake Superior only went back to 1930. I do not recall seeing any figures relating to the amount of income the Escanaba and Lake Superior Railroad has obtained from the Milwaukee Railroad being only about one-tenth of the total income that the Escanaba and Lake Superior received during the past few years. I have some figures that show all the operating revenues and income and all the expenses and the figures that I have indicate that the rental paid and other payments by the Milwaukee to the Escanaba and Lake Superior, if discontinued, would make the difference between a profit and either breaking even or a loss for the Escanaba and Lake Superior. In 1934, the figures I have show gross income for the Escanaba and Lake Superior of $84,604.27, which includes payments made by the Milwaukee. Payments for 1934 made by the

Milwaukee, were $84,604.58, so that it would be wiped out, the gross income and there would be left a red figure at that point. My statement, however, that the elimination of the Milwaukee ore traffic might make the difference between a profitable and non-profitable operation is not based on those figures alone. I examined the figures for several years back and that is what they indicate. I looked at those over-all figures and they would indicate what might happen. Now, as I stated in my direct examination, I did not make any detailed analysis of these figures (Rec. 358-360).

Taking the figures for 1934, I did take into consideration that if the Milwaukee ore traffic and coal traffic had not moved over the Escanaba and Lake Superior, that line would have spent less for maintenance that year. I made inquiry as to whether maintenance and other operating expenses would be materially reduced if that traffic were discontinued, and was told that the operating expenses were pretty near down to bed rock now. The auditor gave me that information (Rec. 360-361).

From my experience, I would admit that it would be reasonable to expect that if this ore traffic was taken off this line the maintenance of way expenses would be reduced from year to year. I did not attempt to reach a final figure of what that would be. I know that losing that much revenue, even with some adjustment in the operating expenses, [fol. 288] the result would be very close to the dividing line between what appeared to be an operating profit and an operating loss. That seems to follow just from a general examination of these figures (Rec. 361-362).

The income the Escanaba and Lake Superior received from the Milwaukee under the contract during the year 1934, was a very small part of its total income, for that year; but it is just that part that makes a difference between a profit and a loss. For example, we were talking about the maintenence expenditures. The contract requires a minimum rental of $27,000 and in addition to that, of course, the proportion of the operating expense, that is, maintenance of way etc., and in that year 1934, those expenditures were a whole lot less than they had been in previous years, so that they have already been materially reduced. I understand that under the contract, the Escanaba and Lake Superior would be getting $27,000 and upward per year without the use of its tracks by the Milwaukee and be re-

lieved entirely of maintenance for the use of the Milwaukee but I doubt if that would be a net profit of $27,000. For example, in 1929 the expenditure for operation by the Milwaukee, maintenance operation and general expenditure was $186,000 odd dollars; in 1934, it was only $35,000, so those expenditures have already been cut to the bone and there could hardly be much more saving to the Escanaba and Lake Superior if that operation were discontinued. These figures are the amounts paid for maintenance, operation and general expenditures by the Milwaukee to the Escanaba and Lake Superior as its proportion of those operating expenses (Rec. 362-363).

Mr. Burchmore: He was asked if the road would be self-sustaining without the income afforded by the trackage contract. Now, if you want to assume the income will continue, of course, the road will be self-supporting. I am not assuming that the income will cease so far as he is concerned, but I asked him, without the income, with his trackage contract, considering the source of income and the source of traffic and all that, in his opinion would this road be self-sustaining. He said it would not.

Exam. Stiles: I understood from what he says, from what [fol. 289] he has said, that he has included this revenue that is to be paid, even if no ore traffic moves over the road.

Mr. Burchmore: I asked him on direct examination, without the income whether or not the road would be self-sustaining. Of course, if they are going to get the income, the road will be self-sustaining, but that is not for the Commission to decide (Rec. 364-365).

By Mr. Morehouse:

Q. You spoke of $182,000.00 some odd dollars, which you say was paid by the Milwaukee in 1929 to the Escanaba and Lake Superior under this contract. As I have it here, in 1929 the Escanaba and Lake Superior obtained gross railway operating revenues of $447,561.00 over and above anything paid to them by the Milwaukee. Does that check with your figures?

A. Yes, sir.

Q. The figures I have here show that the Escanaba and Lake Superior obtained other income during that year of $72,382.00, which does not quite check with the $182,000.00

figure you gave. Can you harmonize those figures in any way?

A. Why, I don't know whether I can harmonize them. The figure that you have, that you just mentioned, is one reported as total non-operating income for that year, reported in its returns to the Interstate Commerce Commission. The figure I read included maintenance, operation, and general expenditures of $186,020.18 paid under the operating contract for that trackage. It is my understanding that all of that came from the Milwaukee that year (Rec. 365).

For 1930, the Escanaba and Lake Superior received railway operating revenue of $361,374 without taking into account anything received from the Milwaukee Road. There was other income for that year of $70,693. For 1931 the Escanaba and Lake Superior received railway operating revenues of $258,790, not including amounts received from the Milwaukee on the contract. That year there was other non-operating income amounting to $58,992. That figure and the $70,693 for 1930 would include some of the money received from the Milwaukee under the contract. That will be shown by another witness (Rec. 365-369).

My comparison of the Escanaba and Lake Superior with the line of the Escanaba, Iron Mountain and Western did not give consideration to the latter being used as one track of a double track line, the other track being the Chicago and North Western line through Norway and Powers to Escanaba.

[fol. 290] My conclusion is reached not so much from deciding whether one was a double track and the other a single line, but how necessary either of those two lines was to the service being performed. My comparison is really of the routes for the movement of ore between Channing on the one hand and Antoine on the other (Rec. 370-371).

Redirect examination.

By Mr. Burchmore:

[fol. 291] My information is during the six months of the year that ore is not moving this northern line is hardly used at all. That line is for extended periods regarded as a suitable location for empty cars standing on the main track. So far as this being part of a double track system

that is in connection with ore traffic only. This Escanaba, Iron Mountain road is not used individually for traffic other than ore. No passenger trains are operated over it (Rec. 371-373).

[fol. 292] L. O. HEINTZ, being first duly sworn, testified as follows:

Direct examination.

By Mr. Burchmore:

I am auditor of the Escanaba & Lake Superior Railroad Company and am in charge of its accounts, and have been since January 14, 1924.

I have had experience in railway accounting work, from 1902 to 1907 with the Elgin, Joliet and Eastern; in 1908 with the Southern Pacific, in 1909 and to 1919 with the Missouri and North Arkansas as a traveling auditor, chief clerk, auditor freight and passenger accounts, and assistant auditor and auditor. From 1919 to 1924 I was with the United States Railway Administration as a field accountant in charge of audits in the Pacific Northwest. From 1924 to date I have been with the Escanaba and Lake Superior Railroad Company as auditor (Rec. 414).

In 1925 I took the examination and was given the rating as senior accountant and auditor with the Interstate Commerce Commission and was tendered a position in 1926 which I did not take. I am familiar with the accounts of the Escanaba and Lake Superior Railroad Company and they are kept in accordance with the Commission's classification and regulations with which I am also familiar (Rec. 415).

Exhibit No. 11 is an income statement covering each of the five years 1930 to 1934 inclusive. Exhibit No. 12 contains in detail the figures of income account No. 501 and the figures of operating expense accounts 531 for 1931. Exhibit No. 13 is a like analysis for the year 1932 and Exhibits Nos. 14 and 15 are similar analyses for the years 1933 and 1934, respectively (Rec. 416).

Exhibits, 12, 13, 14 and 15 break down the first two items on Exhibit No. 11, that is, the top figure on Exhibit No. 11, railway operating revenue and the bottom figures, railway

operating expenses. For example, the first figure for the year 1931, railway operating revenues $258,789, is broken down into the constituent types of revenue on the upper bracket of Exhibit No. 12 and shows that it is freight, passenger, mail, express, milk, switching and so forth. The second line on Exhibit No. 11, railway operating expenses [fol. 293] $203,849.13 is separated by the five primary accounts in the lower bracket on Exhibit No. 12. That has been done for the other years (Rec. 416-417).

Exhibit No. 15 dealing with the year 1934, shows that the total of operating expenses was $169,586 (omitting cents in reading the figures). That total operating expense includes a net of $32,140 charged for maintenance way and structures. That is a net figure after the joint facility credits are taken out. The total amount originally charged for maintenance of way and structures was a good many thousand dollars more than $32,140 (Rec. 417-418).

Exhibit No. 16 shows the extent to which these operating expense accounts were affected by joint facility credits for the four years, 1931 to 1934. The second item on Exhibit No. 11, for 1934, railway operating expenses, $169,586 is broken down in Exhibit No. 15 into five general accounts —maintenance of way and structure, maintenance of equipment, traffic expenses, transportation expenses and general expenses. Exhibit No. 16 breaks down the three general accounts that are affected by the Chicago, Milwaukee, St. Paul & Pacific joint operation; the three items so affected being maintenance of way and structure, transportation expenses and general expenses (Rec. 418-419).

The gross expense for maintenance of way and structures for the year 1934 was $52,866.91 of which $20,726.68 was charged to the Milwaukee Road as a joint facility by way of joint facility credit and $32,140.23 of the gross figure went into our railway operating expenses as appearing in total on Exhibit No. 11. In like way our transportation expenses and general expenses were made up of items finally entering into the railway operating expenses and partly items borne by the Milwaukee Road (Rec. 419).

If we considered all of the railway operating expenses, including those charged against the Milwaukee, the figure for 1934 would have been $169,586.42, plus $35,234.02 or something around $205,000 (Rec. 419).

Exhibit No. 17 is an analysis of the income statement as adjusted to reflect the Milwaukee's joint facility credit

[fol. 294] for the year 1931. I have prepared a series of statements for the four years, the one for 1932 being Exhibit No. 18, for 1933 Exhibit 19 and 1934 being Exhibit No. 20 (Rec. 419-420).

Exhibit No. 20 dealing with the year 1934 is a condensed analysis of the income statement which is shown in more detail in Exhibit No. 11, the last column for 1934. The amount as reported with the credits from the Milwaukee operation is shown in column 1. In column 2 is the amount that the Milwaukee has contributed to the income. In column 3 is the income statement excluding the amount contributed by the Milwaukee. According to Exhibit No. 11 that net income, using that phrase in a technical meaning as defined by the Commission regulations, was $72,365 for 1934. If all of the items charged against the Milwaukee Road had been borne by the Escanaba and Lake Superior and the same money transaction otherwise had occurred, there would have been a loss of $9,448.66.

In reaching this figure of $9,448.66 no adjustment was made for income tax, but joint facility credits is as reflected in this Exhibit No. 20. (Exhibits Nos. 11 to 20, inclusive, were received in evidence at this point.) (Rec. 421-422.)

Exhibit No. 21 covers the years 1931 to 1934, inclusive, and classifies, according to the principal commodities, all of the carload freight which the road hauls. It also shows the tonnages of carload and less than carload freight. This exhibit covers all of the traffic according to our record which the road handled these four years and as reported to the Interstate Commerce Commission (Rec. 422-423).

Referring back to Exhibit No. 11, at the bottom of that Exhibit are certain figures of Escanaba and Lake Superior and C. M. St. P. & P. joint wheelage. Those figures cover all wheelage under the agreement between the two roads on the jointly operated main line property. To determine the approximate number of carloads of ore hauled by the Milwaukee Road in 1934 over the E. & L. S. from Exhibit [fol. 295] No. 11, we would divide the C. M. St. P. & P. joint wheelage by 124, assuming that every loaded car goes back empty, and 62 miles each way would be 124 miles for each car, and then, of course, the locomotives and the caboose have to be considered too. The figure of 1,240,954 represents the miles of ore cars loaded and empty and cabooses and engines in connection therewith. Exhibit

No. 21 does not contain any of these statistics of ore hauled by the Milwaukee Road over the E. & L. S. rails, and it should not (Rec. 424).

Exhibit No. 22 shows the amount of carload traffic originated at each of the stations on the E. & L. S. west of Groos for the year 1934. This does not include any tonnage originating at stations Groos and east and the tonnage there shown is arranged by individual stations with the adjoining spurs and the total number of cars originated west of Groos in 1934 was 1,424. And according to this exhibit the total number of carloads of freight handled in 1934 was 13,383 (Rec. 424-425).

Exhibit No. 23 is a statement which classifies the tonnages originating west of Groos in 1934 by the nature of the commodities. The total of cars originating west of Groos and which moved locally on the line was 1,034 and 390 moved from these stations to destinations on other lines of railroad. The tonnage west of Groos was in part local and in part interstate in character. (Exhibits Nos. 21, 22 and 23 were received in evidence at this point.) (Rec. 425-426.)

Exhibit No. 24 is a statement of the year 1929 taken from "the Iron Ores of Lake Superior", Seventh Edition, Crowell & Murray, 1930; this is the best source of information in the iron trade. The Exhibit shows the tonnages for the year 1929 of the mines therein shown and operating mines on the Menominee Range. The Exhibit shows the names of the mines as they appear in the volume and that volume indicates which road or roads serve each mine. I verified the total tonnage to Escanaba against the Milwaukee's figure and they were substantially right. (Exhibit No. 24 was received in evidence at this point.) (Rec. 426-428.)

[fol. 296] Mr. Burchmore: Now, interrupting the examination of the witness for a moment, I should like to ask the indulgence of counsel while I make this statement regarding six exhibits which I desire to offer. We made inquiries as to the tonnage of ore from the Menominee Range to Escanaba and I was furnished by Mr. R. F. Loman, in charge of traffic for the Cleveland Cliff Iron Company, with what he stated to be published reports of the Lake Superior Iron Ore Association for the years 1929 to 1934, inclusive, and Mr. Loman was here Saturday and was compelled to go home,

and is not here at this time to identify those exhibits. The totals appearing on each of these exhibits check with the exhibit that the applicants filed so far as those exhibits went, and I do not believe there is any doubt of these figures. The figure for 1929 was checked by this witness against his records and found to be within 150 or 200 tons of the same, which as you see in 5,000,000 there is no discrepancy at all, and I would like to have counsel examine these six statements and consent to their going in under a little informality, when I state they were composed from the statistics furnished us as stated. I ask that with the assent of the carriers I may be permitted to file the following six exhibits which Mr. Loman would have verified on Saturday hadn't he been compelled to leave:

Exhibit No. 25 showing the shipments for the year 1929 from the Menominee Range, one column headed "all rail" I am informed relates to shipments not moving to Escanaba, on each of these exhibits. In checking I only checked totals, and did not pretend to check that this was what each mine showed. But the Lake Superior Ore Association reports these figures and they are commonly circulated among the ore mines or mining companies and are the basis on which they govern all of their consideration, that is my information, and Mr. Loman would so testify. That association figures, I have them here as circulated, covering the Mesaba Range, the Gogebic Range and the Menominee Range and the Cuyuna Range, and this is the page only that relates to the Menominee Range (Rec. 428-431).

[fol. 297] Exhibit No. 26 is a like statement for the year 1931; Exhibit No. 27 is a like statement for the year 1931; Exhibit No. 28 is a corresponding statement for the year 1932; and as Exhibit No. 29 is a like statement covering the year 1933 and finally Exhibit No. 30 is a like statement for the year 1934 (Rec. 428-431).

(The above exhibits were received in evidence subject to permission granted to applicant to submit any necessary corrections within five days after the close of the hearing.) (Rec. 431.)

Mr. Burchmore: Mr. Examiner, a question has arisen on Exhibit No. 24 to which I should like to direct your attention. It shows that from pen mines at Norway the tonnage shipped was 472,381 tons which appears in the column

"both roads." Referring to this volume, the Iron Ores of Lake Superior, Seventh Edition, it will be found on pages 281 and 282 that from pen mines *the* "The ore is shipped via the C. & N. W. and the C. M. St. P. & P. Railroads to Escanaba," and the figure for pen mines, 1929, is 472,381 tons. Now, the Milwaukee officials tell us that the pen mines were not served by the Milwaukee Road in 1929. If so, the book is in error, as I understand the book, and the exhibit will be in error in that particular.

Mr. Sutherland: That ought to go over under the column "C. & N. W.".

Mr. Burchmore: I would say so, if their statement is correct. We are only basing it on what the book shows. Now, it may be that there are other mistakes of the same nature on the list, but if so, it is because the book reports it inaccurately to that extent. The figures in the last column on Exhibit No. 24 do not purport to show much is shipped by either road.

Mr. Sutherland: No. That is true.

Mr. Morehouse: If I understand that exhibit correctly, Mr. Burchmore, the figures in the first column are supposed to be mines served exclusively by the North Western and in the second column those served exclusively by the Milwaukee and in the third column those served by both companies.

[fol. 298] Mr. Burchmore: According to the published book.

Mr. Morehouse: Yes.

Mr. Burchmore: Now. Exhibit No. 25 does show correctly and from another source the quantity moving via the North Western and the quantity moving via the St. Paul from individual mines.

Mr. Sutherland: That has got that tonnage all under North Western.

Mr. Morehouse: Exhibit No. 25 corrects Exhibit No. 24 in that respect, you will see on it there that the 472,381 figure from the pen mines is shown as being moved via the North Western.

Mr. Burchmore: I would like the record to show with the permission of the other side that I regard the tonnage figures on Exhibit No. 25 as correct and those on Exhibit No. 24 as questionable, the tonnage figures.

Mr. Morehouse: I might point out further on Exhibit No. 24 that the tonnage of 30,441 shown under the Milwaukee

columns from the Rogers mines should be under both roads because that mine is served jointly.

Mr. Sutherland: The tonnage is all right, but the column is wrong.

Exam. Stiles: Well, to the extent that Exhibit No. 25 is different from Exhibit No. 24, it is your position that Exhibit No. 25 would correctly represent the situation, Mr. Burchmore?

Mr. Burchmore: Yes, sir; and we got the data on Exhibit No. 25 several days after we had made up Exhibit No. 24 (Rec. 431-433).

The Witness: The Escanaba and Lake Superior was incorporated in 1900 which is in a general way coincident with the original contract with the Milwaukee Road whereby the line was built to Channing (Rec. 433).

The E. & L. S. investment in road and equipment carried in its general balance sheet as of December 31, 1934, is $2,031,939.81. In valuation Docket No. 725, 121 I. C. C. 454, the Commission found the value for rate making purposes and the cost of reproduction of this property as of June 30, 1918 was $1,767,725.00. That value has not been entered on our accounts for the purpose of making rates (Rec. 433-434).

[fol. 299] The same report finds the cost of reproduction new, excluding land, as of June 30, 1918, to be $2,026,297. Then there were land values of $55,080 making a total of $2,081,377 as of that date. Our ledger value was of June 30, 1918, $1,902,998.40. Under the methods of accounting of the bureau of valuations V. O. 3, since June 30, 1918 to December 31, 1934, we have made additions in the amount of $799,062.06 and have made retirements of $581,693.19 or net additions and betterments of $217,368.87, making the cost of reproduction new as of December 31, 1934, $2,298,745.87 (Rec. 434-435).

The ledger figure, of course, will be different on account of the method of retirement prescribed by V. O. 3. The additions and betterments since June 30, 1918 to December 31, 1934, as placed on the ledger according to the I. C. C. accounting rules, was a net of $128,941.41, giving a present book value of $2,031,939.81, which is the figure I previously stated as being our investment in road and equipment as of December 31, 1934 (Rec. 435-436).

The limit of my authority and responsibility does not extend to jurisdiction over operations and maintenance. The limit of my jurisdiction is accounting and handling purchasing, taxes and other office work only (Rec. 436).

I have prepared a statement of dividends paid since the beginning of dividends (Rec. 436).

Cross-examination.

By Mr. Sutherland:

I am not familiar with the details of the original contract with the Milwaukee and Escanaba and Lake Superior. I have not prepared any figures earlier than 1930 as to earnings. I am not prepared to say how the years from 1931 to 1934, inclusive, compared with the half dozen years prior to that as regards earnings of the Escanaba and Lake Superior. I would venture to say that in 1927, 1928 and 1926, the earnings were about the same as 1930; that would be a little better than 1934 but not much. We had a loss of $25,000 in 1923. I went there in 1924 and made up the financial state-
[fol. 300] ments for 1923. That is the only year I recall we had a loss. I made up the tax returns and that is why I remember it distinctly (509-511).

Since I took over my duties in 1924, I think about 26 or 27 miles of 90 pound rail has been put in. That is a guess. Some of that, at the north end, was a replacement of rail of equal weight (Rec. 512).

Exhibit No. 16 shows how much of the total maintenance expenditures over which the Milwaukee has rights, was paid by the Milwaukee. In 1931, $86,000 was spent for maintenance over that portion of the road of which the Milwaukee paid $38,972.82. The item of transportation expense shown is also a Milwaukee contribution. It consists of those items that are jointly used under the transportation expenses, dispatching trains and water for locomotives and so forth. General expenses include general office expenses (Rec. 512-514).

In 1931, there were 407 tons, $11,727.17 worth of rail renewals; that is, rail over the entire system not just the main line. I can't say how much of that was paid by the Milwaukee (Rec. 514).

From these records I cannot say how much of the rail renewal expense was contributed by the Milwaukee nor how

much was added to the capital investment of the Escanaba and Lake Superior. We did add certain amounts to the capital account. I could not say just where in 1931 we relaid rail other than on the main line. We do relay rail on yard tracks and sidings not considered a part of the Milwaukee contract (Rec. 515).

I remember one year when we replaced a part of the rail on the Escanaba branch beyond the Milwaukee connection. We have a furnace or plant on our line that uses ore, but they do not use ore from the Menominee Range (Rec. 517).

By Mr. Burchmore:

Q. Did I not ask you to verify this figure of $629,800.00 against your wheelage records to see whether that was the figure the Milwaukee handled?

A. The total. Yes, I verified the total and the wheelage records.

Q. You verified the figure $629,800.00 as being the quantity that moved via the Milwaukee, or approximately?

[fol. 301] A. Yes; I checked that against the information I had.

Q. That would be your wheelage reports from your office records?

A. Yes.

Q. So that we were offering these figures, for these years to show what mines they came from in the belief that the figures from the Milwaukee Road is what was handled over the Escanaba and Lake Superior.

Mr. Morehouse: May I ask the witness, when did you check those?

A. I would say in the last two weeks or ten days (518-519).

The figure $48,972 in Exhibit No. 17 showing net income of the Escanaba and Lake Superior for 1931 is a net income credit but excluding the Milwaukee's proportion gives a red ink item, a loss, of $61,693.25 (Rec. 521).

I did not say that the Escanaba and Lake Superior would not be self-supporting if it did not have the Milwaukee ore traffic. I am not competent to say that. I said if it would not be for the revenues received from the Milwaukee Road during these years, there would have been deficits, assuming the same maintenance and transportation charges of all types (Rec. 521-522).

For the last four years all I have heard preached around our establishment was economy, but I presume if they are going to keep the roads safe they would maintain it, if the Milwaukee ore did not move over it, but I am not competent as an operating man to say how they would maintain it. Common sense would tell me that if there was less traffic there would be less of certain kinds of maintenance, but I could not say how much less (Rec. 522).

In taking into account the figures with reference to the deficits that might be incurred on the Escanaba and Lake Superior I did not take into account that under the pooling plan the Milwaukee will continue to make payments to the E. & L. S. (Rec. 523).

In Exhibits 17 to 20, I have segregated out and totaled the amounts contributed by the Milwaukee under this contract and shown them in the second column of each of the exhibits. [fol. 302] Then, using that total figure and applying it against our net income for each year shown separately on those four exhibits a deficit figure in red is shown in each instance. That is a mathematical computation, columns 2 and 3 reconciling column 1. I do not contend that if the Milwaukee Iron Ore business had not been moved over the Escanaba and Lake Superior that the actual result of our operation would have been anything like these deficit figures. I arrived at these figures by assuming all expense which the E. & L. S. incurred in connection with providing for and facilitating the movement of the Milwaukee traffic and in rail renewals that went on during that time, and the Milwaukee had paid us nothing we would have had these deficits (Rec. 524-525).

[fol. 303] George N. Harder, recalled as a witness, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Burchmore:

I have made no attempt to interest our employees or any one else, the brotherhood or others, in opposing this application. I was furnished with a number of copies of the contract which was attached as Exhibit A to the application but

considered it a private matter and distributed it only to our executive officers (Rec. 526-527).

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Burchmore: That is all from the two protestants that I represent.

Exam. Stiles: I understand there is no further evidence from any protestants. You may proceed with the rebuttal (Rec. 528).

[fol. 304] E. W. Soergel, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Morehouse:

I am Assistant Freight Traffic Manager of the Chicago, Milwaukee, St. Paul & Pacific Railroad, with headquarters at Chicago. (Mr. Soergel's qualifications on traffic matters were admitted by protestants). Tariff I. C. C. B-6262 is a tariff covering iron ore from the Menominee Range, issued by the Milwaukee Road, and the Escanaba and Lake Superior Railroad is shown as a participating carrier on page 2 of the original issue. The tariff applies on iron ore from stations in Michigan and Wisconsin to quite a number of destinations in Illinois, Wisconsin, Iowa, Tennessee and various other destination states. Item 1030-D on page 4 of Supplement 6 to I. C. C. B-6262 does not include the Escanaba and Lake Superior as a participating carrier in the rates covering the movement of iron ore from points on the Menominee Range to the docks at Escanaba. By the Menominee Range, I refer to the points shown in the item starting with Amasa and going down as far as Stambaugh. In this item, under column B is carried a seventy-two-cent rate and the rates in column B apply to dock yards via route 1. Route 1 on page 19 of the original tariff is via C.M.St.P. & P. RR. direct. In the latest supplement to this tariff, Supplement No. 8 on page 3 under title Routing Instructions, this paragraph is shown—the rates named in this tariff will apply only via the routes and junction

points authorized herein except that when in the case of pronounced traffic congestion, not an embargo, wash out, wreck or other similar emergency or through carriers' error, carriers forward shipments via other junction points of the same carrier, the rate to apply will be that specified in this tariff but not higher than the rate applicable via the route of movement. There follows a statement regarding the departure of the fourth section, being authorized by the Interstate Commerce Commission fourth section order. Under those state of facts, the seventy-two-cent rate applying to the dock yards would not apply in connection with the Escanaba and Lake Superior Railroad (Rec. 529-530).

It has always been my understanding that we have han- [fol. 305] dled the movement of iron ore in past years from the Menominee Range to the docks at Escanaba through an operating contract with the E. & L. S. (Rec. 530-531).

Item 1030-D of the tariff referred to has a rate under column A of 81 cents which applies to furnace tracks. That rate is restricted to apply via the Chicago, Milwaukee, St. Paul direct, so under that tariff the Escanaba and Lake Superior is not a participating carrier in the movement of ore from the Menominee Range to the furnace at Wells (Rec. 530-531).

[fol. 306] Cross-examination.

By Mr. Burchmore:

"Q. Mr. Soergel, what rate is there in this tariff, I. C.C. No. B-6262 on iron ore on which the Escanaba and Lake Superior is a participating carrier?

A. Well, I have been looking for it and I can't find it.

Q. Well, I think it is on page 16, in item 1010. I think if ore moved from Amasa, Michigan, to Wells, Michigan, a point on the Escanaba and Lake Superior Railroad, it would enjoy the eighty-one-cent rate?

A. Well, that item also is shown as via the Chicago, Milwaukee, St. Paul & Pacific direct.

Q. But on the contrary you have a provision by which if no other provision governed, The Escanaba and Lake Superior switching charges would be absorbed, to accomplish delivery?

A. Yes, we have a provision for absorption of switching charges in another tariff, not in this tariff.

Q. Well, to use item 1010 of this tariff and assume the ore came from the Marquette Range or came from the Gogebic Range or came from the Cuyuna Range, would the eighty-one-cent rate apply for deliveries on the Escanaba and Lake Superior Railroad?

A. That may possibly be correct, in connection with the route to which is shown from Ishpeming, the routing instructions read via Champion, Michigan, and no routing shown beyond Champion. It may be that under the Michigan laws, state traffic, that that rate might apply over the Escanaba and Lake Superior." (Rec. 531-532)

Item 1030-D is not substantially different from item 1030. Under those items, covering movements from Amasa, Michigan to the Milwaukee's docks at Escanaba, the movement would be over the Milwaukee's rails to Channing and then [fol. 307] by reason of the operating contract with the Escanaba & Lake Superior, we would handle that in our trains and with our crews to the dock, using only the rails which happen to be owned by the E. & L. S. between Channing and Escanaba. The same would be true from Crystal Falls on the Milwaukee road. We could strike out the name of the E. & L. S. as a participating carrier in that tariff and not make any change in the rate (Rec. 532-533).

By Mr. Morehouse:

I was speaking of past practice. I don't know anything about this pooling arrangement (Rec. 533-534).

[fol. 308] S. F. Miller, being first duly sworn, testified as follows:

Direct examination.

By Mr. Morehouse:

I am Freight Traffic Manager of the Chicago & North Western Railway Company.

Mr. Burchmore: Mr. Miller's qualifications are admitted. (Rec. 534)

The Witness: Reference has been made to Chicago & North Western freight tariff covering among other things movement of iron ore from the Menominee Range points on the Menominee Range to the docks at Escanaba. G.F.E.

5175-T, I.C.C. No. 1027. I have that tariff with me. I have heard the testimony of Mr. Soergel. As to whether the same situation obtains in so far as showing the Escanaba & Lake Superior Railroad as the participating carrier—the same situation in general as with respect to the Milwaukee tariffs mentioned by Mr. Soergel: Our tariff on iron ore in which the Escanaba & Lake Superior is interested shows the destination as Wells and I believe theirs shows Escanaba, a slight difference in that way. That is iron ore going to the Delta Chemical & Iron Company, with a furnace located not far north of Wells and served exclusively by the Escanaba & Lake Superior trackage. And the rates shown in this tariff in which the Escanaba & Lake Superior is a participating carrier are the rates on that ore only which goes to that one industry. They are not shown as a participating carrier in the movement of iron ore from the range to the docks (Rec. 534-536).

Cross-examination.

By Mr. Burchmore:

The list of participating carriers in this tariff includes the Escanaba & Lake Superior Railroad Company, under affix 5, No. 109. It includes the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, under affix 5, No. 151. And the tariff is issued by the Chicago & North Western Railway itself (Rec. 536).

On page 7 there is a rate published of 72 cents from Crystal Falls, Michigan, to Escanaba, Michigan, for deliveries through our docks. There is no other rate to Escanaba. There is another rate to Escanaba and it is the same as to Wells. This other rate to Escanaba is 81 cents. As to whether there is any routing shown in connection with the Wells rate: The Wells rate is specified here as will route via Escanaba and the Escanaba & Lake Superior Railway. As to whether there is any instruction as to how it gets up to Escanaba: We are the initial line and it is our rate, to route via Escanaba in connection with the Escanaba & Lake Superior. There is no routing provided or connection for handling it via the Escanaba & Lake Superior to Escanaba and then the Escanaba & Lake Superior to Wells. The only routing provided is via Escanaba and the Escanaba & Lake Superior destined Wells. The

Escanaba rate applies only via the Chicago & North West-
[fol. 309] ern Railway because there is no routing provided (Rec. 537-539).

Q. But there is no provision in the tariff that excludes any other route, is there?

A. Well, except that where any other route is hooked up with our rate, there is a routing provided and the key to it right there.

Q. Will you show me any general provision in this tariff that states that where the North Western runs from point of origin to destination that it will not apply — any other route than the single line route?

A. I would rather show you that where we use any other line in connection with ours, there is a routing provided. I don't think that the question you ask is covered at all. I think it is only covered the other way, as to the connection with another road, the route in connection therewith (Rec. 539).

Redirect examination.

By Mr. Morehouse:

As the tariff has been construed, as the ore has moved under it in past years, the movement of the ore from the Menominee Range to the docks at Escanaba via the North Western has been entirely North Western movement throughout, and the Escanaba & Lake Superior has never, at any time, participated in any way in any of that ore traffic (Rec. 540).

Recross examination.

By Mr. Burchmore:

Q. Do you know how the ore actually is moved from your first hand knowledge, so that you can state that none has ever been handled by the Escanaba & Lake Superior?

A. I should say so, most positively. That, unless there was a detour incident to a wreck or cloud burst or something, that might have been used, the Escanaba and Lake Superior Railroad cannot reach our ore docks.

Q. Oh, I know that.

A. And that is the only place we have ore going to Escanaba outside of a furnace over at Wells (Rec. 541).

[fol. 310] CHESTER E. OLIPHANT, recalled as a witness, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sutherland:

Exhibit No. 32 is a statement of the income account of the Escanaba and Lake Superior Railroad for the 11 year period, 1923 to 1933, inclusive. This information was taken directly for Poor's Manual for the year 1933. I think we have checked some of these figures from the so-called statistical books and so-called blue books of the Interstate Commerce Commission; the latter show very few figures for class 2 railroads. This Exhibit was objected to by counsel for the Escanaba and Lake Superior but it was agreed that it might be received subject to permission granted to both parties to correct any errors that might appear when checked against I.C.C. reports and further showing of the protestants by exhibits similar to those numbered 12 to 21 but for the years covered by Exhibit No. 32 not covered in Exhibits Nos. 12 to 21, inclusive. (Such exhibits, numbered 11-A, 16-A, and 21-A, submitted to the Commission after the close of the hearing, were received in evidence.) (Rec. 541-548.)

Exhibit No. 33, received in evidence, is a statement of all payments made by the Milwaukee Road to the Escanaba and Lake Superior in the period 1923 to 1932, inclusive. The different columns show the amount paid in maintenance of way and structure and transportation, general, total operating expenses, taxes, rentals, certain amortization and interest on certain additions and betterments, and certain current betterments and additions. In that respect, our accounting practice is that additional weight of rail in our accounts is charged as operation and I presume in the books of the Escanaba and Lake Superior is charged to capital account (Rec. 549).

It has been my understanding and information that the last recent extensive rail program on the Escanaba and Lake Superior was carried on between the years 1927 and 1930. That is reflected in the cost the Milwaukee paid for maintenance of way and structures and is responsible for the extremely high figures of those years taken in consid-

eration with certain current betterments in the next to last column (Rec. 549-550).

In connection with relaying rail of a heavier pattern, under the contract with the E. & L. S. I think we pay our wheelage proportion of the cost of rail less the salvage on any heavy program of work as well as any light pro-
[fol. 311] gram (Rec. 550).

In those years the Milwaukee paid on the average 82 per cent of all the maintenance of that class on the Escanaba and Lake Superior Railroad over which its trains ran so that the rail improvement on that line was paid for 82 per cent by the Milwaukee. I heard testimony about the great expense that the Escanaba & Lake Superior went to, to fit this track up to carry this ore. Assuming that there was a great expense, it did not follow that it was paid for by the Escanaba & Lake Superior. In so far rail goes, it was paid for about 82 per cent by the Milwaukee. As to ties and ballasts, that, of course, would be operating expenses. It would not involve any addition and betterment. That would be paid for in the same proportion, 82 per cent about. All this data was taken from the Milwaukee's voucher record. (Rec. 550-551). That is, as far as rail goes it was paid for about 82 per cent by the Milwaukee and ties and ballasts, not involving any additions and betterments, would be paid for in the same proportion (Rec. 550-551).

There might be a few dollars difference between these figures and the figures of the Escanaba and Lake Superior as we show the year in which the adjustments were applicable while in their accounts it may be shown in the year in which payments are made and accounts settled. Payments made to the Escanaba and Lake Superior for rail replacements were entered into the capital account of that line. That is for betterment and that would be proper accounting. On our accounts, however, I don't know as we could put into capital account any money expended for additions and betterments on a line under trackage rights. I doubt it and we did not do so in any event. The rail, of course, becomes and remains the property of the Escanaba and Lake Superior with no claim of title in the Milwaukee; there might be some color of title but it would not be definite (Rec. 551-553).

In the last seven or eight years I have made studies of perhaps 20 lines proposed for abandonment in various localities served by the Milwaukee. I have heard testimony here that the E. & L. S. will probably be forced to abandon service from Channing down, if the Milwaukee ore ceased to move over that line. The Milwaukee will continue to pay the E. & L. S. the minimum rental of $27,000 a year whether it moves or not. There will also be continuation of payments of amortization of certain additions and betterments amounting to about $1,300 a year. The maintenance costs on the E. & L. S. have always been kept at a pretty high figure. It is a very well maintained road. If the ore traffic [fol. 312] should go off that line it would revert to the status of an ordinary branch line throughout that country and there would be about the same traffic as on other branch lines of the Milwaukee in the same area (Rec. 553-555).

The maintenance on other branch lines of that territory are not kept in the state of perfection that the E. & L. S. is. I should judge the road might be maintained on the average for between five and eight hundred dollars a mile. A great many branch lines do not get maintenance of five hundred dollars a mile, it depends upon the period of rail renewals and whether you are retrenching on maintenance. I expect maintenance on our branch lines to run pretty close to five hundred, allowing for accrual on rail renewal. I would say it would run pretty close to $30,000 on that piece of track. The expenses there have been some $2,000 a mile, including the relaying; that would be about 25 per cent of what has been paid (Rec. 555-556).

Ore traffic is pretty heavy traffic. Before saying there is an immediate necessity of abandoning the E. & L. S. I would want to know how much the train service would be reduced. It might just be for local service and so forth and forest products, that a tri-weekly service or something less would be satisfactory. I don't know whether that motor car and passenger service is a paying proposition or not. It would be a question there whether they would keep the line open east of Ralph or determine to terminate it at Ralph and let it deteriorate into a logging road east of Ralph. They might be tempted to keep it open from Ralph to Channing, to preserve the minimum rental. I presume there might be a chance, even that the minimum rental would be forgotten, if the line was broken, but that mini-

mum would be helpful with the minimum of train service and maintenance which might run less than my figure considering the heavy rail. Most of the maintenance there, I judge would be tie renewals. The minimum rental there would always take care of the entire maintenance for the line from Wells Junction to Channing (Rec. 556-558).

I do not think the terminal earnings would be lessened to any particular degree by the absence of Milwaukee ore. The industrial situation, aside from where the E. & L. S. enjoys freedom of obtaining business from the North West-[fol. 313] ern terminals in Escanaba which might disappear, would be unchanged. All business now interchanged with the Milwaukee through Channing could be interchanged with the North Western through Escanaba, with the exception of the business at Northwestern industries or terminals there, at approximately the same revenues, I should think, as the Escanaba and Lake Superior now receives (Rec. 558).

In our investigation on the ore record we found no ore moving over our rails to the ore furnace at Wells, Michigan in the last 12 years (Rec. 558).

Cross-examination.

By Mr. Burchmore:

I always thought the North Western furnished the ore to this furnace at Wells, Michigan and I knew or thought I knew that some of it came down from the Marquette Range and was delivered by the E. & L. S. as the delivering road (Rec. 559).

It is my opinion payments which have been made to the Escanaba and Lake Superior by the Milwaukee have been in accordance with the contract between the two companies. I do not suggest that the contract has not been carried out or that the charges which the Escanaba and Lake Superior has made, either debits or credits to its operating expenses and its income and investments are not in accordance with the Interstate Commerce Commission accounting regulations and have no reason to suppose that they are not (Rec. 559-560).

I am not prepared to say that if the Escanaba and Lake Superior had no support whatever from the Milwaukee that there is promise of sufficient traffic to support a line between

Groos and Channing, I rather wanted to imply that there was no assurance that the line would have to be abandoned. There is no assurance that it would be self-supporting but it is worth a study. If traffic other than ore is handled in the future from Escanaba and Wells to Channing it would afford a through route to the outside in addition to the North Western as long as the rails of the E. & L. S. are not broken (Rec. 559-560).

Redirect examination.

By Mr. Sutherland:

[fol. 314] The ore that went to the furnace at Wells would not be pooled under this contract (Rec. 561).

Recross examination.

By Mr. Burchmore:

We did not interpret the contract as meaning that the ore to this furnace at Wells would be pooled even though it came from the Menominee Range, due to the fact that it was not handled over the dock also. That was another requisite to the pooling. It would be treated as non-pooled traffic on the North Western (Rec. 561).

[fol. 315] D. W. Kelly, recalled as a witness, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sutherland:

A maximum of four crews has been engaged in handling ore on the Milwaukee for the last three or four years. Prior to that time more crews were used, along about 1915 and 16 there being as many as fourteen. At that time ore was moving from the Menominee Range territory, out of Iron Mountain and also from the Norway District up to Channing. Because of the slope of the grades we could haul small tonnage between Iron Mountain and Channing which would affect the number of crews involved when the ore was running heavy. Since 1930 there have never

been anything like twelve or fourteen crews. There are five men in a crew and four crews has been the maximum in the last several years, during the entire ore season and that includes the entire district. Some of those men live at Green Bay and come up during the ore season. They go wherever their rights entitle them to go (Rec. 562-565).

Cross examination.

By Mr. Burchmore:

In 1934, there were only four engines engaged in switching ore in the ore fields, and moving it to Channing down to Escanaba. It took about two and five-tenths crews per day to switch the ore from the mines and bring it into Channing. Those crews performed the switching service at the mines. As to the crews that went to Escanaba, I don't believe there were very many days when there were two trains. It would not average over a train and a half. This pooling arrangement I presume would save some operating expense, but there are very few crews in the iron ore territory the last few years (Rec. 565-566).

Redirect examination.

By Mr. Sutherland:

The North Western has done all the switching in the northern district for several years. The savings to the Milwaukee testified to here come from other sources than the elimination of employees (Rec. 566).

Recross examination.

By Mr. Burchmore:

[fol. 316] The North Western did all of the switching in the northern district except as to the Dober and Hiawatha where we do the switching when we get our ore and the North Western does it when they get theirs, so the North Western does not do all the switching. We also do the switching at Crystal Falls when we are getting the ore. The Milwaukee and North Western both serve the Bristol mines; it is a joint track each of us having equal rights to go in there and when we get the ore we do the switching. The Chicagoan mine has gone out of business. We have

never done any switching at Fogarty or the Bates mine (Rec. 566-568).

Redirect examination.

By Mr. Sutherland:

There are only two mines at Iron River where we never do any switching. There is one more at Rogers where we joint switch, where we both switch in that district and there is one, the Bristol mine at Crystal Falls (Rec. 568).

Further cross-examination.

By Mr. Hughes:

When there is no switch engine there we ask the road crews hauling ore from Channing to Escanaba to put the ore on the dock. We do have a switch engine there at times. The number of crews I mentioned here does not include the crews at Escanaba, because we had a switch engine there seventy-five per cent of the time during the ore season and the rest of the time the road crews placed the ore on the dock (Rec. 569).

The Milwaukee's road crews take care of all the switching at the mines and also the road haul. The crew at Escanaba is taken from the seniority list, altogether. When there is sufficient ore they really have groups of assignments. The road crews perform service at Escanaba on the switch engine, when assigned there, and are from the same seniority list as the road crew performing proper work at the mines. There are no separate road crews assigned for Escanaba (Rec. 570).

Mr. Sutherland: Let the record show that the contract, [fol. 317] Exhibit No. 1, has been duly executed by the chief executives of the North Western and Escanaba, Iron Mountain and Western and the Milwaukee Railroad, and attested by their respective secretaries (Rec. 570-571).

[fol. 318] GEORGE W. HAND, recalled as a witness, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Morehouse:

Any ore which in the future might move from points on the Menominee Range to this so-called furnace of the Delta Iron & Chemical Company at Wells, would not in any way be involved or affected by the pooling arrangement if it went into effect. Any ore moving from the Marquette Range to the same industry on the Escanaba and Lake Superior would not be affected in any way by the pooling arrangements (Rec. 572).

On cross examination witness George W. Hand testified as follows:

Paragraph 55 of the contract would have no application to ore moving to the furnace of the Delta Iron & Chemical Company at Wells.

By Mr. Burchmore:

Q. Is that not traffic to an industry served by the Escanaba and Lake Superior Railroad?

A. It is.

Q. And it could move through Iron Mountain?

A. All of it that went over the North Western from the range would move through Iron Mountain.

Q. Precisely.

A. And always has.

Q. And if it were not for the provisions of paragraph 55 and if it were not for this pooling plan, that ore could move via the Milwaukee from Milwaukee mines to this industry on the Escanaba and Lake Superior Railroad?

A. It does not make any difference what it can do. What I stated was it is not included in the pool or affected by the pool. The pooled ore, the ore that is pooled is limited to the ore that moves through the docks, and then, all ways of getting the ore that is not pooled to destinations, so far as I know, are still left open and will not be shut off, not affected by any of the provisions of this contract (Rec. 572-573).

Mr. Morehouse: That is all.

Exam. Stiles: Is that all the evidence to be presented?

Mr. Morehouse: That concludes the rebuttal.

Exam. Stiles: Briefs will be due on May 16, 1935.

Exam. Stiles: The hearing is closed (whereupon at 2 o'clock, p.m., Tuesday, April 16, 1935, hearing closed).

[fol. 319] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 26903

In the Matter of the Application of the Chicago and North Western Railway Company, Escanaba, Iron Mountain and Western Railroad Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for Authority to Pool Ore Traffic from the Menominee Range to Docks at Escanaba, Michigan, and to Divide the Earnings therefrom

F. D. No. 11025

In the Matter of the Application of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for a Certificate to Abandon Operation Including Trackage Rights in Dickinson, Marquette and Delta Counties, Michigan, and for Pooled Use and Operation of Certain Tracks and Facilities in Michigan and Wisconsin.

Narrative Statement of Evidence

Escanaba, Michigan, February 26th, 1936.

Met pursuant to adjournment, at 10 o'clock, a.m.

Before R. N. Trezise, Examiner

[fol. 320] Proceedings

COLLOQUY

Exam. Trezise: The Interstate Commerce Commission has set for hearing at this time and place Docket No. 26903, in the matter of the Application of the Chicago and North Western Railway Company, Escanaba, Iron Mountain and Western Railroad Company and Chicago, Milwaukee, St.

Paul and Pacific Railroad Company, for authority to pool ore traffic from the Menominee Range to docks at Escanaba, Michigan, and to divide the earnings therefrom. And with that docket is set for hearing Finance Docket No. 11025, Application of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and its Receivers, for a Certificate to abandon operation including trackage rights in Dickinson, Marquette and Delta Counties, Michigan; and for an order authorizing a pooled use and operation of certain tracks and facilities in Michigan and Wisconsin.

Now, your application blanks, or rather your appearance blanks, I believe, have been filed and those that have been filed represent those present. If it is otherwise, the Examiner should be advised.

The Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company filed a motion in Docket No. 26903 to make the trustees of that company parties Applicants, and I presume there will be no objection to the granting of that motion; also a Supplemental Application is filed in Finance Docket No. 11025, making the Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, parties Applicants to that proceeding.

If there are no preliminary statements, you may proceed, Mr. Sutherland.

Mr. Burchmore: Mr. Examiner, I take it from the way you called these cases, you are expecting to hear them on [fol. 321] one record. We have no objection to that. We do have a question to raise as to the status of the record made in Docket No. 26903, at the hearings in April, 1935, if these two cases are to be heard on one record.

Now, if you will bear with me a moment, I simply wish to suggest our position, for we wish to make no purely technical obstructions here.

In Docket No. 26903, the Escanaba and Lake Superior Railroad is a Protestant and Objector, one opposing the granting of the part of the proposed pooling arrangement.

That pooling arrangement contains two vital features, one is the pooling of ore traffic which moves over the rails of the Escanaba and Lake Superior Railroad, and on which that railroad admits it does not do any engine work or train work, or receive any part of the freight revenues as divisions, but it does do some of the manual work in the despatching and regulating of the movement of the trains,

and the money that it receives each year from the Milwaukee Road is directly predicated on the volume of the traffic, and as to that feature, the Escanaba and Lake Superior Railroad says that it is a party involved, and, therefore, within the language of the statute the Application is jurisdictionally defective as to the ore traffic. We stand on that position.

A second, another and vital feature of the proposed pooling arrangement is in paragraph 52, of the contract which has been signed between the Northwestern and the Milwaukee Roads, and that contract, in that paragraph, provides for dividing the earnings on class and commodity traffic of the Escanaba and Lake Superior Railroad, and in conjunction with paragraph 55, if this contract is approved, traffic will be taken away from the Escanaba [fol. 322] and Lake Superior Railroad, and all of the traffic in which the Escanaba and Lake Superior Railroad participates as a common carrier jointly with the North Western and Milwaukee Roads, will be pooled. We are objecting to that.

We are a party participant in that in every conceivable sense of the word, and jurisdictionally that feature is defective.

Now, I am saying these things to register our position and also to point out to you that when we tried this matter in April, 1935, Mr. Sutherland and Mr. Morehouse objected to some features of our showing because they said the matter of abandonment of the Milwaukee Road of operations over the Escanaba and Lake Superior tracks was not proposed or at issue. For that reason we limited our cross-examination. We limited our rebuttal testimony. And it would be unfair if that record taken a year ago were considered as an essential record in the present matter of the two Applications.

Now, may I just ask, I am not going to object to it if it is understood, but may I ask if the record of April, of 1935, is to be understood to form a part of the record on which these two cases will be decided.

Exam. Trezise: And from that question, it would appear that if the evidence taken in the other case were not to be considered evidence in this case, it would be necessary then to duplicate number 26903, with the privilege of giving you the opportunity to cross-examine these witnesses. Perhaps

some of them are present; or can you tell that at this time?

Mr. Burchmore: Well, I really do not know where we stand until we find what the other side does.

Exam. Trezise: I know, it is a little soon to determine whether or not you have a real objection to making this a part of the record. Would it be possible, and would [fol. 323] you feel that your interests would be sufficiently protected if you should wait until you can determine that fact; and you can make that point with the Commission?

Mr. Burchmore: Well, Mr. Examiner, I intended not to move that you consider the evidence taken a year ago, but I asked simply to have you make a ruling as to whether it was understood that that is to be considered.

Mr. Sutherland: It is my understanding that that record made a year ago will be considered as a part of and in connection with the record made to-day; that everything in that transcript will be before the Commission, and such additional matters as come in at this hearing.

Exam. Trezise: Facing the facts squarely, as Mr. Burchmore very well knows, that is the way the cases were set.

Mr. Burchmore: No, they were set in two separate notices, as far as I am advised.

Exam. Trezise: Then, may I advise you that the Examiner received instructions that they were to be heard together.

Mr. Burchmore: And the record made a year ago will be considered as part of the record for the two cases, will it?

Exam. Trezise: So that you may reserve, Mr. Burchmore, that objection, if you feel that it prejudices your interests in any way, and it would be the ruling of the Examiner that it will be only one single record, and that the evidence taken before is part of the evidence that is taken to-day—in fact, I believe the Examiner would have no alternative in that under the present status of the record.

[fol. 324] Mr. Burchmore: Well, we have no objection to that, of course, if the Commission will endeavor to protect us.

Exam. Trezise: And that is your request?

Mr. Burchmore: Yes. Consider the evidence received a year ago in the light in which it was received, and give fair attention, as I am sure you will, to any request we are forced to make for opportunity to examine witnesses, cross-exam-

ine witnesses further as to their testimony at that time. I am not so requesting now, but I am reserving the privilege of making such request.

Exam. Trezise: Very well.

Mr. Sutherland: Further, with respect to appearances, I am authorized to state the following, on behalf of the Applicant, Chicago and North Western Railway Company, and Escanaba, Iron Mountain and Western Railroad or Railway, this statement:

The Chicago and North Western Railway Company's testimony in Docket No. 26903, was introduced at the former hearing, and its position in respect of this Application was clearly and completely stated and remains unchanged at this time. We see no necessity for our participating in the further hearing, since the issue at such further hearing is or should be confined to the Milwaukee Road's abandonment application in connection therewith.

Also, I am authorized to state in their behalf that they propose, at the proper time, to file a motion joining the Trustee as a party Applicant, with Chicago and North Western Railway Company, as has been done by the Milwaukee with respect to their Trustees.

[fol. 325] Exam. Trezise: Well, the Examiner presumes there would be no objection to making the trustees parties.

Mr. Sutherland: No, I believe that is purely formal; but they had not got that done yet, and they wished me to state that that was their purpose. Are we now ready to proceed?

Mr. Burchmore: I suppose that the trustees may do the Commission the courtesy to indicate whether they propose to submit the question of the abandonment of the Amasa Branch to the Commission, as the Milwaukee has now done with respect to this Application.

You will notice, Mr. Examiner, that the pooling application claims certain economies by reason of the North Western's planned abandonment of the Amasa Branch, but they have not as yet seen fit to present that to the Commission on the Finance Docket.

Mr. Sutherland: Of course, that is a matter in which they are solely concerned, and they can not abandon it until the plan goes into effect, and it is not involved, as we see it, in any part of the pooling plan, but is simply a consequence that will follow after the plan becomes effective, and, of course, they stated in their former record, that that was their purpose, and I understand it is still their purpose.

Mr. Burchmore: In view of that situation, I am going to reserve the right. The trustees joining in the Application is not purely formal, the trustees of the North Western.

Exam. Trezise: You object at this time, or reserve the right to object if your interests are prejudiced?

Mr. Burchmore: No, I reserve the right to object when they apply.

Mr. Sutherland: I understand, that the Reporter has [fol. 326] made a suggestion that Exhibits introduced today have the prefix "F", so that it may indicate Finance or further hearing as distinguished from the Exhibits previously entered. Is that satisfactory, Mr. Burchmore?

Mr. Burchmore: It is.

Mr. Sutherland: I wish to have this identified as Exhibit F-1, this document, and this other document as Exhibit F-1-a.

Applicant offers for the record, document identified as Exhibit F-1, which is a certified copy of the contract, original contract between Chicago, Milwaukee & St. Paul Railway Company, and Escanaba and Lake Superior Railroad Company, covering the operation between Channing and Escanaba, which is dated February 20th, 1900.

That was offered. I suppose there is no objection to it. I did not hear any.

Mr. Burchmore: Well, there is no objection to it if you accept the view stated by the Commission in its decision as to its absence of jurisdiction to deal with that contract.

Mr. Sutherland: Well, we are not talking about that. I am not putting it in for that. It is the foundation merely of the terms, and rights by which we operate from the E. and L. S.

Mr. Burchmore: In view of the Commission's statement with regard to this contract and decision in 210, I. C. C. 599, we have no objection.

(Exhibit No. F-1, Sutherland, received in evidence.)

Mr. Sutherland: I offer in evidence the document which has been identified as Exhibit F-1-a, which is the Supplemental, or extension of the original contract. This Exhibit is dated January 1st, 1921, taking effect at the expiration [fol. 327] of the original contract, which has been identified as Exhibit F-1, and is the contract under which Applicant, successor to the Chicago, Milwaukee and St. Paul Railway Company is now operating over the line in question.

Mr. Burchmore: No objection on the same understanding (R. 582-590).

Exam. Trezise: The record will show that when exhibits are identified, introduced and described, they will be shown as received in evidence unless they are later rejected.

(Exhibit No. F-1-A, Sutherland, received in evidence.)

F. M. Sloan, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

[fol. 328] I am a division engineer on the Milwaukee Railroad. My territory covers what is known as the Madison Division, the Milwaukee Terminal Division and the Superior Division, which includes the line from Milwaukee north to the Copper country and includes the line under consideration here. Exhibit F-2 (received in evidence at this point) is a map of the Menominee Range. The line for which permission to abandon is sought is shown in violet color. The Western terminus of that operation, Channing, is in Dickinson County. Passing toward Escanaba the next county is Marquette and the terminus is in Delta County, all in the State of Michigan (Rec. 591-594).

After the main line of the Superior Division reaches Channing there are several branches. We have what we call a main line running almost directly north of Channing to Champion; then there is what we call the Ontonagon line, which runs from Channing through Kelso Junction to Ontonagon, to the North West, Ontonagon being on Lake Superior (Rec. 595).

Exhibit No. F-3 (received in evidence) is the scale of one inch to two thousand feet, and it shows the ore docks and trackage of the C. M. St. P. & P. and the C. & N. W. at Escanaba. It also shows the E. & L. S. trackage in that vicinity. It shows some of the trackage which is involved in the application No. 11025 (Rec. 595-596).

At the top left of the map the E. & L. S. Railroad is shown, as it comes into the limits of this map from Channing, and it is shown as running in a generally southerly direction. At Wells Junction the lines of the E. & L. S. seem to divide and some go off to the right. Those lines that go to Wells are not involved in the Milwaukee operation. The line involved

[fol. 329] in the Milwaukee operation parallels the C. M. St. P. & P. Railroad Company Yard, which is colored in green, and there is a point "A" designated on the map, labeled under the C. M. St. P. & P. trackage rights on E. & L. S. Railroad. That is the point where under the contracts which have been identified as Exhibits F-1 and F-1a Milwaukee's right of operation ceases (Rec. 596-597).

In handling ore the ore trains move from Channing over the lines shown on Exhibit No. F-2 in lavender and finish up on F-3 at the Milwaukee Yard, colored in green. It is approximately 63½ miles from Channing to the point "A". The Milwaukee trackage on this map is shown in green. Our ownership near the point "A" is to the switch, and that track leading off to the east, towards the docks. In passing from the Milwaukee yard to the North Western yard for traffic going to the North Western docks the point "A" is the place where the train would pass from the E. & L. S. tracks to the North Western tracks. That is the point where there is a connection to the C. & N. W. trackage (Rec. 598-599).

Cross-examination.

By Mr. Burchmore:

The tracks colored in green on Exhibit F-3 are owned by the Milwaukee Road and the land on which they are located is owned by the Milwaukee Road. I cannot make a positive statement but my impression is that if this application to abandon in Number F. D. 11025 is granted, those tracks in green are to abandoned and taken up (Rec. 599-600).

[fol. 330] Chester E. Oliphant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

I am Chief Statistician of the Milwaukee Railroad.

The return to the questionnaire was prepared under my supervision and direction. (The application and the reply to the questionnaire were received in evidence subject to cross examination.) Exhibit F-4 (received in evidence)

supplements some of the returns in the questionnaire and shows applicant's income for the full year of 1935 (Rec. 600-601).

Exhibit F-4 represents the standard form of income statement as required by the I. C. C.; was taken from our general books and is in the form shown in our annual report. The income available for fixed charges, six million dollars odd, are the fixed charges of the company without the disturbance account of the present bankruptcy (Rec. 601-602).

At the former hearing we had a statement showing ore tonnage. Exhibit F-5 (received in evidence) is an addition merely of the tonnage figure for the years 1933, 1934 and 1935, showing the tonnage from the Menominee Range, hauled by both the Milwaukee and the North Western, and the total tonnage handled over the Escanaba docks which includes also in addition to the Menominee Range ore, the ore from the Marquette Range (Rec. 602).

Exhibit F-6 (received in evidence) is an abstract for all the years from 1923 to 1935, of information from the E. & L. S. bills against the Milwaukee for the use of its tracks from Channing to Escanaba, including some small charges for Wells Yard. A similar exhibit has been heretofore introduced down to the year 1932. This is for the years 1933, 1934, 1935 and goes a bit further than the previous exhibit in that it shows the E. & L. S. proportion of common charges that are apportioned between the two roads, in maintenance of way and transportation, general expense, taxes, and certain additions and betterments, making a total in the next to the last column, of the total Milwaukee payments to the Escanaba and Lake Superior, and in the last column, the total of the E. & L. S. expenses that are apportioned from common expenses and taxes, and additions and betterments. The figures in the second column from the right include the figures in the third column from the right (Rec. 602-603).

[fol. 331] The trackage-right contract with the E. & L. S. fixes a rental. We pay the wheelage proportion of the fixed amount of $54,000, but our share at no time shall be less than 50 per cent or $27,000 aside from some small amount for station rentals. So long as the contract remains in force that would be the amount the Milwaukeee would pay the E. & L. S. even though it did not operate over it. There would be no other payments under that state of affairs. Those amortization payments would still continue to be made. It

is a payment of past additions and betterments. I do not see how that would be relieved. I think we would continue to pay or pay it up in a lump sum if the contract came to an end by any chance. The estimate of those amounts are shown under the "Amortization and Interest on Certain Additions" column of the exhibit (Rec. 604-605).

As to taxes, we pay our wheelage proportion of the taxes assessable or assignable to the line, for the property we use. Roughly speaking it is the proportion our cars are to the total cars that are moved over the property. The E. & L. S. operates its own trains between Channing and Escanaba on this main line and the Milwaukee operates the ore trains mainly and when we speak of our wheel proportion the proportion is between the Milwaukee ore trains and the general business of the E. & L. S. I do not know whether it is both loaded and empty or just loaded. The contract specifies that (Rec. 605-606).

To state, in a word, the operation that the Milwaukee has over the E. & L. S.:

The Milwaukee operates its ore trains from Channing to Escanaba into the yard, and during this last year the North Western handled our switching, and put the ore through the docks. We are privileged also to handle certain coal outbound from Wells from that coal dock of ours north of our ore dock. We also can handle our company construction material in or out. We are not privileged to handle any general commercial business other than this commercial coal from this dock. We do no intermediate business between Channing and Wells. We have no scheduled services. We have no operation at all in the winter time, the operation being confined solely to the ore season (Rec. 606-607).

Referring to the contract Exhibits Nos. F-1 and F-1a, the interest stated in the original contract was as a lump sum of $10,031.68. Other records at the time, and a subsequent [fol. 332] provision of paying 1½ per cent on additions and betterments, shows that the interest rate was 1½ per cent upon the cost of the road. That contract covered a short period relatively from February 20, 1900 to January 1, 1921. That contract when it expired was succeeded by another, identified as Exhibit F-1a. A change was made in the rate of compensation in the second contract. The basis of the second contract was 6 per cent interest upon the value of the road. It must have been along about $900,000 as it gave a

fixed fair rental for the total of $54,000, and that is apportioned between the two companies upon the basis of wheelage, making our share around $40,000 to $45,000 a year. It is a little less today. Last year it was $34,362. In that contract they took $54,000 as the value of the use, of the entire use of the railroad for both the E. & L. S. and the Milwaukee and divided that on a wheel basis. That is why the figures in Exhibit No. F-6 showing the rental paid varies from year to year. It reached a minimum in 1932 when it was $27,180, almost the identical figure with the minimum fixed in the contract (Rec. 607-608).

Exhibit 6 in the prior record related to the savings the Milwaukee was expected to enjoy if the pooling plan became effective. The abandonment of the Milwaukee operation over the E. & L. S. is a feature of the pooling plan and so far as results are concerned, they are one and the same thing with respect to savings. It is necessary to have the Milwaukee abandon its operations over the E. & L. S. to make the savings that were related in Exhibit No. 6 in the prior hearing (Rec. 609).

Since this Docket No. 11025 is an abandonment of operation application, I will state very briefly the savings that the applicant expects to enjoy if this application is granted. I may remark here that the idea of abandonment, or the abandonment really relates back to the fact that the life of our docks is exhausted and they are no longer usable, and we are faced with building a new dock or making some arrangement with the North Western. The two docks there have reached a point where one of them will have to be rebuilt from the water line up. The other one can't be used at all. One rebuilt would probably suffice for our purposes.

By Mr. Sutherland:

Q. With the tonnage of ore that has been running within the last few years, state whether or not the rebuilding of dock number one would accommodate the tonnage?

A. Oh, I expect a small-sized dock might do it.

If dock number one were rebuilt and probably extended slightly, we figure that it could handle all the ore that we would probably ever get. I think it could handle probably the maximum amount of ore that we ever had, as shown in the record here, back to 1923. The maximum was close to 2,000,000 tons in 1925. It has not reached a million

tons in any year since 1930. It fluctuated along, around half a million tons, except for the year 1932, when it went to the [fol. 333] extreme low of 125,000 tons (Rec. 609-611).

The estimated cost to the applicants to build a new dock satisfactory to take care of the ore business would be approximately $1,000,000.

Q. Now, is that an entirely new dock, or is it the rebuilding of some dock that is there?

A. There would be some utilization of the present foundation.

Q. Of which, dock number one?

A. I believe it is number one, that it was planned to rebuild it, if any of them were rebuilt.

Q. Well, now, what savings—just go head and give us the difference, that is, from which savings would accrue if the abandonment is permitted and the ore pooling plan granted?

A. Following the outline of Exhibit 6 in the prior hearing, the savings were estimated there for both roads, the division being in some cases fifty-fifty, and in some cases proportional to the fixed percentages of the ore to be handled.

Q. Confine your statements. We understand that your previous statement was joint. But now confine your statements to the savings that will accrue to the Milwaukee.

A. That is not so easy. It is because of the complex situation of the contract and the terms, for instance, on maintenance of way. There is a certain part of maintenance of way that is fixed, not affected by traffic, and a certain part that is affected by traffic. Now, on the fixed part, we are to save fifty per cent. We are to pay the North Western fifty per cent. I do not have with me figures to show what the fixed part is.

By Exam. Trezise:

Q. When you say you save fifty per cent, that the money you pay now for the use of the tracks, maintenance and all those other expenses would be cut in two, for the Milwaukee, is that what you mean?

A. Well, it goes back to the basis of a pooling contract. The pooling contract is that we split the revenues on a fixed percentage, based on the tonnage of the past ten years as prior to 1932, and including 1932, we pay our proportion of the expense. That varies with traffic. We pay our proportion of the expense, the operating expenses of the

docks, the maintenance of operations. We will pay a certain fixed rental to the North Western for the use of their docks. In so far as there is initial saving, but the fixed saving, the plan is to split those savings between ourselves and the North Western. Now, take for instance, if we save a certain amount of rent that will be divided fifty-fifty between [fol. 334] the North Western and ourselves. In so far as fixed maintenance goes, we have been paying the E. & L. S. this. We will pay the North Western fifty per cent of that. I cannot estimate just what that maintenance would be at this time.

By Mr. Sutherland:

Q. Well, do you mean you cannot estimate it because you cannot foresee what the tonnage is, or if you were given the tonnage could you estimate it?

A. I believe that I could dig out this information from the papers that I have with me, but I was not prepared to divide the savings between the Milwaukee and the North Western, and I am afraid I may state it wrong without some preparation. If you suspend that inquiry until a little later, I will look into it.

Mr. Sutherland: Suppose we pass that for the moment then.

Exam. Trezise: But, now, you do have some figures, or you were just coming to them?

The Witness: I have the story of the total savings as to how it is to be divided between ourselves and the North Western. That is fully covered, I think, in the contract—the contract which is Exhibit No. 1, in the former hearing.

It is a fact that those savings will vary to some extent with the volume of the ore traffic. Without speaking now of figures, I can state the different fields from which savings will accrue, in my opinion. The first feature is in the use of the dock of the North Western by the Milwaukee, and the savings for the two roads would be equal to the cost of the expense in connection with the Milwaukee dock, if it built a new dock, because that is the alternative (Rec. 612-615).

We have the cost of a new dock, we can calculate the depreciation; we can calculate the maintenance and the taxes, and the total of that amount. We estimate the savings from

the Milwaukee not being required to build a new dock at $110,000 a year. That relates to the dock alone. As to cars and equipment, the number of ore cars required for the combined operation should be considerably less than the number required for the independent operation of both roads. We testified in the preceding hearing on that matter and gave some figures, approximately. We have no occasion to change those figures now. They are already in the record (Rec. 616).

The pooling plan contemplates that all of the tracks shown in green on the Exhibit F-3 will be taken up. That would depend upon what happened when the pooling was effected. Perhaps one or two might be retained if they could find use for them. There has been no absolute decision on that yet but the assumption is that they would all be taken up if the pooling plan is approved and works out as contemplated, and that includes the tracks going to the dock (Rec. 617-618).

Insurance was carried on the Milwaukee's present docks [fol. 335] until some time around February of this year. At that time our secretary was instructed to drop the insurance. There was a watchman there and that expense has been relieved and a certain standby power contract for operation of the pumps has been cancelled. So long as there was a remote possibility that the docks might be used temporarily, the insurance was carried. This year everybody concluded there never was to be a hope of again using those docks as they are and the insurance was dropped. If the dock is to be used none of the super structure would be retained as it is there now (Rec. 618-619).

[fol. 336] D. W. Kelly, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

I am General Superintendent of the lines in Michigan and Wisconsin of the Chicago, Milwaukee, St. Paul & Pacific Railroad, with headquarters at Milwaukee. That includes all of the lines that have been shown on the two exhibits (maps) which have been put in evidence (Rec. 620).

I started my employment with the Milwaukee Road in 1896 and at that time iron ore was handled over the Soo Line through Pembine Junction and over the Soo Line to Gladstone. When the contract Exhibit F-1 was entered into in 1900 there were no tracks into Iron River although there were tracks west of Channing leading to Ontonagon. Ore started to move on the E. & L. S. about 1901. That line did not reach Channing originally, but I am not sure just when it was completed into Channing. Since that time the ore has moved over the E. & L. S. Railroad from Channing to Escanaba to the Escanaba docks. Because our docks were not fit for service our ore went to the North Western docks in 1932, 1933 and in 1935. In 1934 our No. 2 dock was used (Rec. 620-623).

We originate iron ore at Iron River and Crystal Falls and Iron Mountain. None has moved out of Amasa in 1935 but that is an ore point and some ore moved out of the Warner mines there in 1934 from a stock pile. Two mines there, the Amasa and Porter, have not operated for 8 or 10 years; the Warner mine a few years. The pumps were pulled, and have not been in operation there. There was a stock pile and that is about moved (Rec. 623-624).

In the movement of ore from Amasa to Channing on the Milwaukee, the crews are called at Channing to go to the Amasa Porter mine, or the Warner mine, and get the ore and return it to Channing. At times they have a stock pile, and of course, there is a crew held there to load this ore into cars. Sometimes, when the crew gets a train load they bring it in and another crew relieves them, loads the trains and brings it in. The regular service train from Ontonagon and the extra trains bring it to Channing (Rec. 624-625).

As to the movement of ore from Ontonagon to Channing, we always had switching service at Iron Mountain, and ore was assembled at Quinnesec Junction. The crews called at Channing and operated out of Iron Mountain or Quinnesec Junction back to Channing. Quinnesec Junction is just an operating name for a yard within what we call the yard [fol. 337] limits of Iron Mountain to which our switch engines operate and it does not represent a separate town some distance away (Rec. 625-626).

At present the Dober mine is the only one operating at Crystal Falls. The ore there is assembled in the vicinity of the mine, and the crews call at Channing, go over there and get it and return to Channing. We try to get two

trips out of one crew in that territory. That is, they go from Channing to Crystal Falls, bring in the train and return to Crystal Falls and bring another as one days work (Rec. 626).

In the Iron River territory all the ore from what we call the northern district, where the North Western does the switching, is delivered to us at Bates interchange, and we handle it with our own crews from Bates interchange to Bates yard. We do our own spotting of the ore that is handled at Dober mines and the Hiawatha mines within the vicinity of our depot. We assemble some of that ore right at Iron River. We do our own switching at the Odgers mine in the vicinity of Bates and that ore is handled into Bates yard. Crews are run out of Channing and sometimes go into Iron River, and take some of its ore from the Dober and the Hiawatha fields there and come over to Bates and follow up and into Channing. That is generally considered a day's work for the crew. That is, there are two operations, a switch operation and a road operation handled by different crews (Rec. 626-627).

After that ore gets into Channing by hauling crews from Iron Mountain, Crystal Falls and Iron River, it is generally kept on straight tracks so a train can readily be put together. We haven't employed a switch engine for two or three years, and they can haul as high as a hundred cars or 10,000 tons; and after that train is put together at Channing, it is backed out of the yard for about half a mile and a helper engine put behind it, and has to push it out of the yard until it gets over on the Escanaba and Lake Superior Railroad. After that one engine can handle that train to Escanaba, with one exception, at Groos, which is about two miles, I believe, from our ore yards. The train is cut in two, half of it taken up into the yard and weighed, and pulled into what they call the sorting track. The engine returns and gets the other portion of the train and pulls in and weighs it, pulls that into the sorting yard. The engine then goes around the "Y", using the Escanaba and Lake Superior tracks. If they need water they go down [fol. 338] to Wells. If they do not, they go up and get their train off, what I believe they call number 5 track, and the only switching they do on those empty trains is set out bad order cars if there happens to be any, and they are ready to go back to Channing (Rec. 627-628).

Gross is beyond the Soo Line crossing in the direction of Channing. Some weighing is done on some of the tracks marked in green on the map. That is, towards Channing, towards the main line (Rec. 629).

When the Milwaukee was using its own docks we had a switch engine in the yard, shown on Exhibit No. 3, a portion of the time. It broke up the ore trains and placed them on the docks for unloading, took the empties off and assembled them for the trains going back to Channing (Rec. 629).

In 1932, 1933 and 1935, the Milwaukee ore went to the North Western dock outlined in red. In 1935 the North Western engine would go into our yard and classify the ore and move it onto the North Western dock, as it was ordered by the dock agent. The North Western did the switching for the applicant in 1935; also 1932 and 1933 (Rec. 629-630).

An ore train operated by the Milwaukee out of Channing carries no other commodity than ore unless there may be some company material for repairs or fixing of tracks. They carry no commercial material except iron ore. The Milwaukee has no station or point on the Escanaba and Lake Superior Railroad. The crews of the Chicago, Milwaukee, St. Paul & Pacific Railroad handle the ore trains on the E. & L. S., and the equipment is Milwaukee Railroad equipment (Rec. 630-631).

The season for the ore movement is the season of navigation. In 1935 the first ore was handled on April 23 and the last movement to the dock was made on November 18, or a season of 210 days. That would be about the average of the year. I have known of cases where the North Western have loaded ore in a boat and then that boat has moved to our docks and loaded the same kind of ore. I would not say that that is the usual practice (Rec. 631).

Some mines on the Range are served by both the North Western and Milwaukee. The Milwaukee does the switching for itself and for the North Western at the Dober mine. Last year the Milwaukee received 8,339 tons and the North [fol. 339] Western 77,958 tons. At the Homer mine where the North Western does all the switching for both lines, we got 7,156 tons while the North Western received 6,482 tons. I cannot tell just exactly how it is divided, but we get orders sometimes over night to take over a mine that the North Western has been operating, and we just shove

our engines and cars in there and take it over until they tell us it is to be returned to the North Western. As a rule, both of these railroads do not operate in and out of these mines at the same time (Rec. 631-632).

This ore does not move over the E. & L. S. in a uniform and steady day-to-day movement. There are periods when ore is moving in the season and periods when the ore is not moving. Last year August was our peak, and there were just a few trains moved in April, and only a few in May. In 1935 there were 79 trains of the Milwaukee moved over the E. & L. S. That was over a period of 210 days, or roughly a train every three days. But they did not move in that order. There would be periods when there was a train every day and then there might be several days before we would have a movement again. It is not a continuous movement. We may have large movements for two or three days, and it may run along for three or four days and we would not have any. For example, while we are handling some of those mines, we may have a large movement over our railroad, but when they are returned to the North Western, the North Western has it all, so we are standing still (Rec. 632-634).

We frequently have more than one switching crew operating in the mine area at one time. Take up in the Crystal Falls District, if we have a shovel operating there, we might have two shovels, have to have a crew for each one and we will have to have a crew hauling. The activity of the mine controls the operation and if the mines are not operating the engines are standing still and the men are not employed (Rec. 634-635).

When business is lean and there is no interference it probably takes about ten hours to make the round trip between Channing and Escanaba. On the trip back the crews haul empty ore cars. These crews tie up at Channing but I could not say where they live. Some of them live at Green Bay and come up in the summer time and a large majority live at Channing (Rec. 635-636).

If the pooling plan became permanently established I would say our railroad would have no further use for those tracks in the yards shown on Exhibit F-3 but I do not know if any decision has been reached on that question. No decision could be reached until after the pooling plan had been [fol. 340] put into effect (Rec. 636).

Cross-examination.

By Mr. Burchmore:

The ore trains can handle 100 cars if there are that many to go, but in the 79 trains mentioned the tonnage averaged about 8,872 because the business was so lean they could not hold the ore back to wait a full train having to get it over for the boats so that the latter would not have to wait. You can handle 115 mixed cars and we have handled over 10,000 tons, but in 1935 there were only 12 trains with 10,000 tons or more. We can take a train of 100 cars or 110 and pull it into the yard stop for the scales and start it again on account of the grade of the yard. In practice we break a train of that length in two when we are weighing cars (Rec. 637-639).

There are some mines having tracks, jointly owned by the North Western and Milwaukee where we do the exclusive switching and the North Western gets the cars we deliver to them. But there are some joint mines where we do our own switching when the mine is turned over to us. When it is turned over to the North Western they do their own switching and we pull out. I do not mean that we are already pooling our power and resources on the Range (Rec. 639-640).

The Hiawatha mine at Stambaugh is reached by both the Milwaukee and North Western tracks. Those are joint tracks shown in red and yellow on the Map Exhibit No. 4. We take ore from that mine over to Bates with our own power. The North Western goes into that mine, hauls the ore to their yard right here in Stambaugh and it goes direct from Iron River over to Iron Mountain and down, so that in years past both roads have been doing their own switching and taking the cars to their own assembling yards. It would be possible for one road to do the switching for both even though neither gave up its line haul (Rec. 642-643).

The Bates mine is in township 29 and it is 3½ miles from there to Bates. The engine which handles the ore from Hiawatha to Bates takes some ore for Dober or leaves the ore at Iron River where we have a couple of tracks that hold 35 to 50 cars. In a normal year if a shovel is operating they may load 30 cars a day or 35 at the Hia-

[fol. 341] watha mine. It depends upon the activity of the mine (Rec. 643-644).

If the Hiawatha was producing a considerable quantity of ore and other mines in that section were also going well we would probably have sufficient assembly yards at Iron River to handle the ore if we got the crews out of Channing fast enough to have the ore move out of Iron River. At Bates yard the operating capacity is 141 cars; that is it will hold that many. The Bates interchange has a static capacity of 192; operating capacity 152. Bates Yard 177 cars, total capacity, or 141 for operating purposes. In the Crystal Falls District 283 static capacity and 232 cars for operating purposes, Channing 334 and 265 (Rec. 643-645).

We do our own switching at Dober and the North Western does its own. The situation is just about the same as the Hiawatha. The mine at Odgers is in the Crystal Falls District. We handle the ore out of Crystal Falls via Channing and the switch engine which goes to the Dober mine gets ore for both roads and when we have ore from that mine, we are getting it all, it is generally assembled right in the vicinity and we run our cars over to that district from Channing, and there is an interchange right near this mine, where we deliver the North Western's ore to them. In either case we have a switch crew that does the work at the mine (Rec. 646-648).

There are other joint mines shown in the Crystal Falls District but aside from Odgers and Dober, the other mines are closed down and I understand the Dober will be the only mine operating next year (Rec. 648).

The Milwaukee has a yard at Quinnesec Junction, and it was used for the purpose of assembling ore when there was ore to move out of Iron Mountain, but the Chapin mine is out of commission entirely, so we haven't much use for that yard and will hold roughly 150 cars (Rec. 648).

I had no contact personally with the making of the contract in 1900, Exhibit F-1 between the E. & L. S. and the Milwaukee Road and have no knowledge that would lead me to contradict anything recited in that contract. I did [fol. 342] not intend to testify that the road of the Escanaba and Lake Superior was not extended from Watson to Channing, 30 miles, for the particular purpose providing this ore service (Rec. 649).

I cannot remember when I first had knowledge of this pooling plan. We did give study in a general way to different pooling plans than the one that has been put up. I did so personally. We did not study any other pooling plan in particular. We only tried to figure out the best way that this ore could be handled on account of the very small volume that was moving. As far as I was personally concerned I might have been looking into it for four or five years, just wondering how long we could operate and handle such a small amount of ore over the E. & L. S. Railroad. The volume of ore went down to almost nothing in 1931, 1932, and last year it did not amount to much. I did not personally take any part in any surveys before this pooling plan was put into form (Rec. 649-650).

I do not know how many of the yards colored in green on the map will be needed in conjunction with the Milwaukee's coal docks. I would not think we would need any of them.

By Mr. Burchmore:

Q. I find in paragraph 51 of the pooling contract that the Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba & Lake Superior Railroad, and shall discontinue and abandon its yards and other facilities at Escanaba, except its coal dock and tracks appurtenant thereto, which leads me to ask what you know about this exception, the coal docks and the tracks appurtenant thereto, in terms now of your Exhibit F-3. Now, just what tracks does that mean? Why are they excepted? What is going to be done with them? What utility will they have, that you know, or can give us any light on?

A. Well, I could not give you any light on it, I only presume those docks will always be required there. Somebody will lease them. Probably the people that have got them now will continue the lease. And I think the tracks on the dock proper belong to the Milwaukee Road. As to how much of the yards colored in green will be needed in conjunction with these coal docks, I would not think we would need any of them (Rec. 651-652).

In 1900, when the contract Exhibit F-1 was entered into, the Milwaukee operated a line from Champion to Channing, Channing to Ontonagon, Channing to Green Bay and Milwaukee and different branches along the line. The line

from Kelso Junction and Iron River was not then in existence and we had no rails into Crystal Falls. I think we went into Crystal Falls in 1901 and we had quite a few mines in that locality at that time. Shortly after we made this arrangement with the E. & L. S. Railroad and that line was extended over to Channing we developed our railroad and developed our ore tonnage over to the Iron River, [fol. 343] Crystal Falls District. At that time there was no other purpose for which we would have desired to use the Escanaba and Lake Superior, except for ore (Rec. 652-653).

Redirect examination.

By Mr. Sutherland:

The North Western and the Milwaukee would not have switch engines at the Hiawatha mine at the same time or day. When the ore is turned over to the Milwaukee it does all the switching and handles the ore to its line and moves it into Channing and gets the revenue. When they tell us to get out, the North Western puts their engine and equipment in there. As a general rule the mines do not divide their ore between one railroad and the other for the same shipping period. It is either the Milwaukee engine doing all the work, or the North Western doing all the work (Rec. 653-654).

When a switch engine is called for at the Hiawatha mine, if it was for one day, the engine would probably ride out of Channing, go to the mine and do its work. If the work involves more than one day, they will tie it up at Iron River. When they get through with the mine and the tonnage goes back to the North Western, the engine goes back to Channing or we may tie the engine at Iron River and kill it and leave it dead there, until we have services for it at that particular mine, or some other one in the district. The crew would be sent back to Channing. That sort of thing calls for intermittent use over the E. & L. S. (Rec. 654-655).

The ore is weighed at the scales entering the yard. It is not weighed at the mine when it is put in the cars nor is it weighed on the dock. It is weighed entering the yard at the scales. The weight taken there governs all operations where any weight is figured and that is the place

where we divide the train. That is done not because of the weighing but because of an operating condition, on account of the grade entering the yard (Rec. 655-656).

These coal docks are under lease at present to some outside concern. I believe it is Cleveland Cliff. I think they [fol. 344] were in there at the time this contract was made; they have been for a long time. And that is the exception within this paragraph 51 that Mr. Burchmore spoke of (Rec. 656).

There have been discussions between the railroads about pooling the ore on the Range for four or five years. For the last six or seven years I have made studies of the grades in and out of the various mines to see which way the ore might move to advantage. The country in this Iron River District is rough and hilly. The main line and mine tracks have some substantial grades (Rec. 657-658).

It is quite a pull for our railroad to get out of Dober or Hiawatha mine. I think they only take a few cars out of either of those places. Odgers mine is somewhat on a level but the mines in the northern district where the North Western does all the switching, a very few cars are handled out of the mine tracks. That is not a question of track capacity but of grades and of the power of the engine to pull (Rec. 658).

An ore car is about half the length of an ordinary box car; about 24 feet long. Some of the old wooden cars were a little shorter than that. The length mentioned is the over all, the space it would occupy in a train. The super structure that holds the ore is not that long, probably sixteen feet (Rec. 659).

A train of one hundred ore cars would measure around 2500 feet whereas a train of 100 box cars would measure something like 4,300 feet in length (Rec. 660).

Ore from stock piles at the mines is loaded with a steam shovel through tipples. The ore from stock piles at the mines is loaded by steam shovel. From the mine itself it is loaded by a tipple. The tipples dump the ore into the cars as they are spotted. The ore is about half lumpy and half fine (Rec. 660-661).

When a switch crew is sent out from Channing to the Hiawatha mine, as an example, they may work there a day or a week or longer and when they do that the crew stays there and works an ordinary shift of eight to ten hours. The road crews run all directions out of Channing.

They may go from Channing to Escanaba today and tomorrow they may go over to Iron River to get a train or go down [fol. 345] to Iron Mountain (Rec. 661-662).

Recross examination.

By Mr. Burchmore:

While in 1935 the service was rather intermittent, a few years previous, when the movement was more normal it was customary to have several trains per day, day after day over the Milwaukee Road. I would not suggest that 79 trains for 1935 was at all representative of the years 1900 to 1930, inclusive (Rec. 662-663).

Further redirect examination.

By Mr. Sutherland:

In 1935 we had roughly 465,000 tons. In 1932 only 125,000, or much more than a third less. 125,000 tons would take a great many less trains than 465,000 (Rec. 663-664).

There are more mines being abandoned through that territory in Ex. No. 4 in the other hearing every year. Next year it appears that there is only one mine on the Milwaukee, at Crystal Falls, that will operate and that is the Dober mine. There are two good mines at Amasa but they are not working now. We have always received large tonnage from Iron Mountain every year but the mine is now abandoned and filled with water and I have been told that it would take two or three years to put it in operation, if there were any ore left. As a rule it means the end of the mine. There were not as many mines in the field in 1935 as ten or fifteen years ago, probably 70 per cent less. It may run more. No new mines have opened up within the last year or two that I know of. The last of these mines to be opened was the Odgers and that was ten or twelve years ago (Rec. 664-665).

Further recross examination.

By Mr. Burchmore:

Q. If this pooling arrangement does not go through, there won't be any ore there for the Milwaukee to handle anyhow?

A. Yes there will (Rec. 667).

Under the proposed abandonment one railroad would handle the ore; that is, the North Western (Rec. 667-668).

[fol. 346] GUNNER TORNES, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

I made an estimate of the cost of reconstruction of one of the Milwaukee docks some two years ago. If it became necessary I would reconstruct the number 1 dock which is the smaller of the two with regard to capacity for handling ore. It was contemplated that there would be only one dock if there was reconstruction and No. 2 would be discontinued entirely (Rec. 669-670).

The estimate for reconstructing and enlarging No. 1 Dock was approximately one million dollars. I have recently gone over those figures and have had no occasion to change the estimate (Rec. 670-671).

No. 1 dock, if serviceable, would have an approximate present capacity of 42,000 ton-, while the new one would have a capacity of 67,200 tons. It is thought that that would be adequate to handle the ore traffic as it has been running in recent years. I think we figured about one million tons could be handled through that dock if handled on the Milwaukee as it has been (Rec. 671).

The exhibits show that the last year in which a million tons were handled by the Milwaukee was 1930. These estimates were made a considerable time before the prior hearing in this matter. No. 2 dock was used in 1934 but not since. They were not used at all this last year to my knowledge. No money was spent on them in 1935 except a certain amount of watchman service which the record shows has now been discontinued. Neither of these docks can economically be repaired. Before dock No. 2 was used in 1934 it was necessary to make repairs on it a little less than $30,000 being spent. All further expense in connection with these docks has been discontinued because all agreed that they were no longer in condition to be put back into service by repairs (Rec. 672-673).

Cross-examination.

By Mr. Burchmore:

I do not know how much ore was handled through dock No. 2 in 1934 or how much money the company earned. Dock No. 1 has been used a great deal in the past for storing slow moving ore but there were times when both docks were full of ore in years gone by (Rec. 673-674).

I cannot say how much of the estimate of one million dollars goes into labor (Rec. 674-675).

[fol. 347] CHESTER E. OLIPHANT, recalled as a witness, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sutherland:

As to the savings to be made by the Milwaukee Road individually under the pooling, I have no reason to change the showing made in connection with Exhibit 6 where we show that it would cost us, if we build a new million dollar dock, about $110,000 a year to own, maintain, pay taxes, insurance and protection. That is everything except the direct operating expense of passing the ore through the docks. If the North Western handled our ore as they did in 1935, with no capital investment to us, it would cost us $46,000 under the terms of the contract as against $110,000 if we built our own docks. That is $10,000 for rent, $21,000 on the average for maintenance, $10,800 for taxes and about $4,200 for fire insurance and protection, totaling $46,000. That shows an approximate annual saving of $64,000. Now on the presumption of some future, with a return of a reasonable amount of ore from the Menominee Range——

Q. Right there, let us pin down this reasonable amount of ore. Do you figure that any amount less than a million tons a year, or something more than that, I mean, for the Milwaukee's end of it?

A. Well, I would say it would have to be in excess of what we had in 1930. We had a little over a million tons in 1930—we had 1,783,682; and the North Western handled

over that dock 2,923,130. There was a total handled over the dock that year of 4,096,812.

With the assumption that in the future we would build a new concrete steel dock to cost about two and one half million dollars, our expense would be, taking 30 per cent of the total estimated cost of $213,000, as shown in part "b" of Exhibit No. 6, at the previous hearing, would be $63,900; or at that time we would have a savings of $46,100 as compared with building our own dock new. That is, the savings would range from $64,000 under the conditions as they are, to $46,100 under the concept of a concrete steel dock at some time in the future (Rec. 675-676).

In connection with the yard at Escanaba, the ore yard, we save the maintenance not due to use, interest on the salvage and estimated taxes. The total savings are $4,225 and under the terms of the contract we would keep one half of that amount of $2,212 (Rec. 676).

In connection with the line between the range and the dock, these figures are all taken on the ten-year period prior to 1932. We would save for maintenance of way and structures not due to use a total of $41,950. Excluding the [fol. 348] minimum $27,000 from the rental that item would be $15,194. Taxes would be $15,119, and general expense $4,682, making a total of $76,845 of which our share would be 50 per cent or $38,423 (Rec. 677-678).

[fol. 349] Account of the North Western abandonment of this Crystal Falls-Amasa line, there would be saved in maintenance of way $2,681.00; maintenance of way not due to use, interest on net value of salvage, about $600.00; and taxes, $1,000.00, or an estimated total of $4,281.00. Our share would be $2,140.50.

In connection with tracks and yards on the range, account of abandonment of duplicating trackage, we would have a saving in the maintenance, total savings of $5,000.00; maintenance of way not due to use, interest on salvage, $800.00. Taxes $200.00, or a total of $6,000.00 of which our share would be $3,000.00.

Under one estimate of a savings in docks, total for us would be $109,775.00. Under the future concrete steel dock, the annual savings would be lowered to $91,875.00.

Now, that does not include anything for the savings to be accomplished by consolidation of the tonnage through the

docks, which will probably lower the unit cost, any savings for the joint switching or consolidated switching on the range, at intermediate points, and at the docks, nor in the train service particularly at the beginning and end of the ore seasons, nor anything for reduction in equipment required for the handling of the ore. By the latter I mean crews, engines and road equipment due to the consolidation of the tonnage (Rec. 678-679).

Q. Now, speaking of these items for which you have not given us any specific figures, let us speak of the cars. What is your estimate, if you have one, with respect to the number of cars that the Milwaukee would be required to own and maintain if the pooling plan goes into effect, and that means if this abandonment goes into effect, as compared with what we would have to be equipped with for the operation as it has been in the past?

A. As testified in the previous hearing we at one time had 1800 to 2000 cars. Some were very light capacity, 30, 40 and 50 ton wooden cars. Beginning some years ago, we began to change and have acquired 800 steel cars of 70 ton capacity. It was our program to buy about 1300 steel cars with the idea that we might handle our business independently, but that was before the depression. We would probably have to have 1500 cars under independent operation to handle the maximum we have handled in the period 1923 to date. That would be pretty close to two million tons in 1925 I believe. We have been unable to reach a mathematical conclusion as to the number of cars now being maintained that could be reduced under the pooling. I have consulted with different people, and information would place it somewhere around 20 per cent in cars. Fewer cars would be required because of elimination of stand-by by both companies. The operations through separate collection yards, general distribution of equipment, the amount required on time on hand for boats, as they appeared there, or for advance notice of their arriving. It is just a general consolidation of two streams of business into one which will naturally reduce the number of cars required. Assuming 20 per cent is a fair figure, 20 per cent of our 1,500 cars would give us 300 cars; and they are worth a little over $2,000 a piece. For rough figuring say $2,000. That would cost us $600,000 investment.

In 20 per cent of the cars with interest at 5 per cent, and [fol. 350] depreciation a couple per cent, and repairs a couple per cent, maybe we could save about 10 per cent of that, or $60,000 a year. That is a rough figure. That is in addition to the fixed figures I have given (Rec. 679-681).

I have not been able to compile any figures for lessened cost of switching on the range. I feel confident there are substantial savings to be accomplished there, because of the consolidated action, the lack of necessity to keep the business of the roads separate, and under a general plan of consolidating two classes of business somewhat similar.

Q. You have heard it testified here that in the past the Milwaukee would be moving substantially all the ore out of a given field for a period, and then switch over with the next period, with the North Western, back and forth. You are familiar with that? Now, you may state whether or not among these lessened expenses, you feel there would no longer be any necessity for one road rushing this equipment into the field and then withdrawing it in a few days, and then another road rushing full equipment into the field. Is that one of the things that comes into your calculation?

A. That is one of the features. It is also a feature in the car supply (Rec. 681-682).

As to savings in road haul, the only thing I could conceive of as to savings is that possibly train miles could be saved at the beginning and end of the ore season when neither road has full tonnage (Rec. 682).

As Mr. Kelly testified, out of the trains that ran this year only 12 had full tonnage. Cost per train mile is practically the same whether it has full tonnage or something less. You can add additional tonnage without increasing cost per train mile but there would not be as many train miles under the plan and the saving would come in that (Rec. 682).

I heard Mr. Tornes' statement of what the new dock would cost. As to whether or not there might be some difficulty in securing funds for that capital investment, it has been difficult for us to secure money the last four or five years on account of financial conditions and lack of volume of business. It is pretty difficult to secure money for fixed property investments. In this respect these docks are different from road equipment. The latter is

good security, not fixed to the ground and can be moved off. You never have any difficulty obtaining money for standard equipment (Rec. 682-683).

A million dollar dock would not be good security for a loan because that depends upon the prospect of business continuing throughout the life of the structure. If for some reason or other the traffic should cease the dock would be worth purely its salvage value and the cost of removing would be so great that there would not be much salvage (Rec. 683-684).

[fol. 351] There would be no salvage in the present docks if we are required to remove them entirely. Raising capital for that kind of investment involves a showing of anticipated business in the next ten years and with a record behind us of five years it would be pretty hard to make an optimistic picture. It is rather a depressing picture than an optimistic one. It might lead to consideration of going out of the ore business. I do not think that is out of question (Rec. 684).

Cross-examination.

By Mr. Burchmore:

There is nothing in my testimony as to savings that is at substantial variance with the figures appearing in Exhibit No. 6. I have in fact practically repeated the figures in Exhibit No. 6 but have divided them between the Milwaukee and the North Western. I have given no consideration in this matter of savings to the matter of revenue derived because that is presumed to be the same whether we pool or do not pool. On my Exhibit No. 6 I have talked about the savings to us, but have ignored everything but expenditures, because the revenues are not disturbed. In my Exhibit No. 6 I speak of what it would cost the Milwaukee road, if it handled the ore with its own dock, or built a new dock, and what it will cost the Milwaukee if the ore is handled through the North Western dock. It is true if we handle a million tons of ore through the Milwaukee dock, we would get 10 cents a ton revenue for handling that through the dock. And if the out-of-pocket cost of handling the ore through the dock is only 5 cents a ton, there would be $50,000 there of revenue against the savings, to cover the fixed charges on the dock.

Q. Exactly. Well, you have not paid any attention to that revenue, and you would not receive any revenue if that ore went through the North Western dock?

A. Oh, yes, we would. The contract specifically puts that dockage, to our share, on 34 per cent.

Q. Let's see. Maybe it does and maybe it does not. Perhaps I did not understand. Let us take your figure on the dock saving.

A. Revenues are not distinguished whatever. Not even the storage charge of a quarter cent a ton after a ten-day storage. Not even the revenues to the Milwaukee.

It would cost if we build a new dock $110,000 a year. This figure appears on Exhibit No. 6. I have not credited any of the dockage charges that might come from handling a million tons of ore over that dock against that figure. To arrive at the savings I show what it would cost us to [fol. 352] use the North Western docks, 32.2 per cent on $32,600, about $10,000 for using their docks until such time as they build new docks. But we could not handle a million tons of Milwaukee ore over the North Western docks. It is presumed when we get up that high there will be action taken to build a new dock. Our rent is fixed until they invest some other money in the dock property. The provision of the contract that has that effect is on page 3, paragraph 12 (Rec. 688). There is also a provision in the contract by which the 10 cent dockage charge would all be enjoyed by the Milwaukee against this $32,000 of expense—it is paragraph 2, under the heading Division of Tonnage and Revenue, under paragraph 4. On that basis, the Milwaukee Railroad, instead of getting its entire revenue of a hundred thousand dollars on a million tons of ore, would only get 34 per cent of that. But we get 34 per cent of the North Western's, too. So it is equivalent to giving us the full amount of their own. It is true it is better than that if the North Western's percentage happens to run high, but all we had to go on was the average of the ten year period (Rec. 689).

I am suggesting that under this pooling there will be a large saving to the Milwaukee Road, and there will also be a large saving to the North Western Road. And those two savings are separated in the showing here so that it can be determined what they are. They are separated in this way—I recited in the first instance, without any new con-

struction whatever, that we would save $64,000. At the same time we pay the North Western $46,000. Now, whatever we pay the North Western is practically velvet to the North Western (R. 690). I say that without any new construction the North Western would save practically all we pay the North Western, $46,000. I am talking about the docks at Escanaba alone, and without any new construction. As to what, if anything, the North Western would save with new construction: that would have to be computed differently, because it would pay, it would need an entire new structure for both railroads. Under block "B" of Exhibit No. 6, you will find that the joint operation under the concept of the $2,500,000 steel concrete dock, the annual cost of $213,000, the North Western's proportion of that would be 70 per cent. That would be $149,100, their annual cost of owning and maintaining their share. Their estimated cost is $212,000 independently in that same block. They would have annual savings of $62,900, which would make about $109,000 savings for the two companies and that is the figure of joint savings developed below that tabulation. The base figures from which these savings are deducted [fol. 353] would be what it would cost us independently to own, maintain and pay taxes on docks, shown under "B" Exhibit No. 6 coming to $322,000. This would be on the basis of five million tons a year. On that tonnage for both roads the public would be paying $500,000 dockage charges. These figures do not include any direct operating expense of passing the ore through the dock, which might be 3 to 4 cents a ton. We used to figure it around 3¼ cents. I believe that last year it ran below 3 cents slightly. I would say a fair estimate is 3 cents. That would leave 7 cents for that five hundred. That would give us $350,000, against a cost of $213,000. With a steel concrete dock it would be profitable, the dockage charge; at a lower volume of business it would be unprofitable. But I have not in these figures accounted for the revenue. It is undisturbed (Rec. 692-693).

Provision "34, on page 7 provides the North Western agrees to handle the Milwaukee's proportion of pooled traffic and such non-pooled traffic hereinafter defined as the Milwaukee is now privileged to handle over the E. & L. S. This does not provide any specific rent therefor, other than

the share of savings otherwise provided. The word specific could have been left out of the provision as one half of the savings are to be paid to the North Western (Rec. 693-695).

Under paragraph 35 we pay nothing to the North Western for maintenance not due to use. It is presumed that maintenance due to use of our traffic and our cars moved with the cars and traffic over on the property of the North Western. We are willing to pay our proportion of the maintenance due to use and figure we break even. I cannot say with the support of figures that the maintenance due to use will not be greater when we pay it to the North Western under paragraph 35 than it has been to the E. & L. S. but if there is anything true in the theory of the A. R. E. A. formula it should come out so that it is the same. If the mileage over the North Western was longer that would increase the part due to use (Rec. 695-696).

I should correctly say that there is no part of maintenance not due to use on the North Western that we pay directly. In lieu of that we give them the savings of the maintenance not due to use that we save on the E. & L. S. in the nature of 2.762 cents per ton which represents half of the fixed maintenance on the E. & L. S. in the ten year period ending in 1932, divided by the tonnage of that period. If we had arrived at the figure by using the tonnage of the year 1935, a very light tonnage, we would probably have had a lighter amount (Rec. 697-698).

In my direct examination I said there would be a factor of saving to the Milwaukee of one-half of $76,845. That [fol. 354] figure relates to operations over the Escanaba & Lake Superior, and is the figure in paragraph 51 of the contract, Exhibit No. 1. That is based on an analysis of operations over the Escanaba & Lake Superior for 10 years ended in 1932. If it had been taken for 1935, we would have to separate maintenance between that due to use and that not due to use. You would have to deduct from your $75,000 over in the next to the last column of Exhibit No. F-6, about one half of the maintenance of $17,000. That would be $75,034, less, say, $9,000. There is another deduction which should be made from rent in that.

If we based this matter of saving on the figures for the three years 1933, 1934 and 1935 instead of the ten year

period ending 1932, instead of saving one half of $76,000, we would have a saving of $79,000 less $10,000 less $27,000. That is less $37,000, or a saving of $42,000. But, of course, these are just rough estimates I am giving now in my answer. And that would have to be divided by the tonnage of those three years to get the tonnage figure. It looks like it might be nearer 5 cents a ton instead of 2.7.

Q. So the less tonnage you have the more you save per ton?

A. I don't know.

Q. But the less tonnage you have over the Escanaba & Lake Superior Railroad would be diverted under this operating arrangement, the less saving you will have in dollars per annum by the pooling arrangement?

A. Well, of course, it follows that the less tonnage the higher our unit cost is over the Escanaba & Lake Superior on account of certain costs being fixed or partially fixed (Rec. 698-700).

It is true that in submitting this contract to the Commission for its approval, we are proposing a pooling arrangement for a long period of years.

Q. Do you think, from your examination of the facts, that you have sufficient figures so that you can say with assurance that the savings based on the ten year period of 1932, would certainly be mathematically the savings or representative of the savings for 1940 and 1950, and years after?

A. Well, one thing that was developed in here, and I think it is a safeguard, was that in the maintenance due to use is curtailing the heavy laying of rails, and that we are to pay for the maintenance due to use actually as incurred upon the North Western, so we are not carrying over an extraordinary cost during that period of heavy rail laying into the future, because rail is affected 100 per cent by use under the formula.

Q. Well, if arriving at figures of savings for the fifty year arrangement, or 99 year arrangement, you must admit that the savings will relate to varying factors and bases over [fol. 355] so long a period?

A. Well, as far as abandonment of property goes, there is no other way it could be handled. It is the savings, the

interest on the salvage. That is a definite thing. The fixed maintenance and in so far as the savings from the E. and L. S. goes, that is fixing things for the future. But I do not know why there should be such a wide fluctuation in it, as this rent goes down until the end of the contract.

Q. Well, there are many variable factors for the future to be considered if this ore moves via the North Western.

A. But I don't think we are running much chance as long as we pay a proportion of the expense only.

Q. And as long as you are assured of 34 per cent of the net?

A. Well, that, of course, is a factor.

Q. This contract that I have just referred to, in its provision number 35, for a joint survey, has any such joint survey been made or undertaken up to date?

A. No, sir. It is proposed to make that the moment that the pooling looks like it is going to be approved (Rec. 700-701).

I spoke of the difficulty of securing funds for capital investment, and mentioned equipment, and so forth. As to whether a million dollars is a vast sum of money to our road, it was not up until about five years ago but since then it has been quite a sum (Rec. 703-704). I do not know of any definite attempt to finance a new ore dock at Escanaba. There is a reluctance, I expect, to even think of spending a million dollars in view of the present tonnage of the ore, and its immediate future, even if you could raise the money (Rec. 704).

Q. Now, may I ask you about this clause, No. 52: "By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad"—and so forth.

Now, have you made any figures by way of a study of a six year period, or otherwise, to determine just what the effect of this paragraph 52 will be on the Milwaukee's revenues?

A. We have ascertained for that six years period and independently the North Western has ascertained for their road, the amount of their revenues and our revenues. We have ascertained ours, and they have theirs, on business interchanged with the Escanaba and Lake Superior Rail-

road for the six years period. We are not quite in agreement yet as to whether certain business should be included or excluded, but practically we have an agreement, and we know the figures (Rec. 705-706).

[fol. 356] As to when I ascertained what the figure was as to the Milwaukee Road, I have a statement in front of me that was dated on the typewriter on March 29, 1935, purporting to show an analysis of the freight traffic interchanged between the Milwaukee and the E. & L. S. for the period. It was some time prior to that because it took our freight auditor some considerable time to develop the figures. The statement is not made up by years; it is only complete for the period. It is for the six year period 1927 to 1932. It shows the total net Milwaukee revenue on the business interchanged with the Escanaba & Lake Superior was $766,645, for the six year period. That figure is subject to some slight change possibly, but I think it will be very slight (Rec. 706). The North Western Railroad has submitted to us the figure they claim. That figure, the North Western's revenue, for the same period, and that is the figure that may be subject more to changes than ours, is $992,290.

Q. Now, as I understand those two figures, accepting them to be correct, during the six year period the North Western Railroad had $992,000 of revenue. You had $766,000 of revenue on traffic interchanged with the Escanaba and Lake Superior Railroad, to wit, all traffic excluding iron ore. There wasn't any iron ore in it?

A. No iron ore. That is general commercial business.

Q. And as I understand, paragraph 52, you proposed, if those figures are correct, to pool the future revenue on percentages?

A. Yes, sir.

Q. Represented by those two figures?

A. Yes, sir.

Q. Now, if paragraph 52 is adopted, and these figures are used to pool the revenues thereafter?

A. Yes, sir.

Q. Will there be a saving on that item to the Milwaukee, or a loss?

A. If the business in the past, or in the future is the same character as in the past, we will be about as well off as we are now.

Q. And suppose the result of this abandonment of the ore movement, and so forth, should be that the Escanaba & Lake Superior had to be abandoned, its line over to Channing, had to be abandoned, it was cut off at the western end. This provision here would protect the Milwaukee Railroad against any substantial loss due to the discontinuance of that connection, wouldn't it?

A. It would. That was at least the purpose of it.

[fol. 357] Q. So that even if the public along the line can not get any protection, you are thoroughly protected if this railroad is destroyed as a result of your action?

A. Well, I do not know as to that. We put in all the provisions we could think of.

Q. That is an unfortunate way of putting it perhaps, is it?

A. Yes, sir, I think it is a little unfair.

Q. But whether it is unfair or not, the result of paragraph 52 is if you should lose all the traffic coming to and from your lines at Channing, nevertheless for the future you would be getting from the revenues of industries on the Escanaba & Lake Superior, the same percentage as though the business had moved based on your six year experience?

A. That is true in net revenues.

Q. Well, net revenue is all you are interested in?

A. Yes, that is true (Rec. 707-708).

There is a little difference between my Exhibit F-6 and the figures in the original Exhibit 6, in this item 3. It originally showed taxes account Milwaukee discontinuing use of E. & L. S., $15,019. That is based on the ten year figures 1923 to 1932, and in Exhibit No. F-6, in place of $15,019 I show $14,661. That difference is due to a change in the figures for 1927. I am sorry to say there was an error made in that, but we had in Milwaukee proportion the total taxes of both ours and the E. & L. S. proportion. It should be $16,618, as the Milwaukee proportion for the year 1927 taxes. I did not think it was of enough importance to call particular attention to it (Rec. 709). As to whether in previous Exhibit No. 33 I had that figure $20,195, I think you will find that is the sum of two figures in the column under taxes, both E. & L. S. proportion and Milwaukee proportion. Exhibit No. 6, as filed at the prior hearing, ought to be changed to substitute $14,661 for the $15,019 (Rec. 709-710).

Redirect examination.

By Mr. Sutherland:

The pooling plan does not cover any revenues that accrue to the E. & L. S. If they continue operation and traffic continues their revenues would not be affected by this pooling plan in any way.

Q. Now, this question of this contract reaching out into the future, in so far as changing conditions can be foreseen, what do you say as to whether or not there is the same protection against changes in the future for one road in this [fol. 358] pooling plan as for the other? Do you know of any prospective or possible change that can effect one road adversely and another favorably under the pooling plan?

A. Only such an item say as taxes on the Escanaba and Lake Superior. Suppose that it should be doubled, or should be cut in half in the future? Well, that is one of the things that we fixed by virtue of this payment per ton (Rec. 713). That is on the whole a very negligible item in the total of all items.

It is not contended that there may not be some slight variation from year to year or from period to period as to the absolute net benefits to each of these carriers from this pooling plan. There may be some variation, but the bulk of the saving should be in the expense affected directly due to use. I should think operating conditions in such a narrow territory would be apt to be about the same for one road as for another. We, that is, both the North Western and the Milwaukee are willing to take a chance on the agreement being equitable in the future (Rec. 713-714).

[fol. 359] So long as the E. & L. S. operates in its present line up, the interchange at Channing is open to that line the same as it has been in the past and this plan contemplates no change in that.

Q. Nor does it in that sense affect the revenues?

A. No effect upon the revenues.

Q. That is the future of their revenue will be affected no more than in the past, so far as anything in the plan is concerned?

A. That is true (Rec. 714).

This plan in that sense has no effect upon the revenues of the Escanaba and Lake Superior (Rec. 714).

Recross examination.

By Mr. Burchmore:

Q. Paragraph 55 of the signed contract, between the North Western and Milwaukee, has a very ambiguous reading to the Counsel for the Escanaba and Lake Superior, and its officials.

"The North Western agrees to join with the Milwaukee in establishing appropriate through rates and divisions for handling interline traffic via Iron Mountain."

Now, stopping right there, the quotation, that would mean a division by which the North Western handles the traffic from Escanaba to Iron Mountain, and the Milwaukee handles it from Iron Mountain down, wouldn't it?

A. Yes, sir.

Q. to Establish through rates and divisions for handling interline traffic via Iron Mountain "so as to permit the Milwaukee to continue handling business to and from industries served by the Escanaba and Lake Superior Railroad, either direct or through reciprocal switching arrangement with the North Western."

Wouldn't that in effect amount to this, that the North Western will put in through rates from Escanaba so that everybody in and around Escanaba can ship via the North Western through Iron Mountain, and thus cut the E. & L. S. out of the business from this territory entirely?

A. The intent of that paragraph, as I recollect the situation, was contemplated protecting against a discontinuance of, or abandonment of the E. and L. S., and protecting that channel, so that we could still continue to do business with the E. & L. S. through the Iron Mountain and via the North Western as an intermediate carrier.

Q. So if the line of the Escanaba and Lake Superior is taken up west of Groos, we will say, or the west end is taken out, the Milwaukee here is amply safeguarded?

[fol. 360] A. We have tried to protect ourselves.

Q. But doesn't it go further than that? Doesn't it operate from now on so that the North Western Railroad will now put in such rates and divisions, the net results of putting in such rates and divisions being in conjunction

with paragraph 52, that you two roads would divide almost all the revenue on Escanaba business, and the Escanaba and Lake Superior would have very little revenue at all?

A. I do not think that would hold in the case of business originating and terminating on the E. & L. S., where the routing would send it via Channing.

Q. Well, will you go as far as to admit that if you were employed by the Escanaba and Lake Superior Railroad, and know all you know now, you would certainly object to that clause, wouldn't you?

A. I have never thought of it in that way. I see only in it the protection against the broken channel through Channing.

Q. Well, I think you are a fair minded man. I really mean that. I want to be fair with you. I do not want to wrestle about this thing, but even if that clause is a good one for the Milwaukee Road, isn't it a very threatening one from the standpoint of the Escanaba and Lake Superior, quite objectionable to them?

A. You see, it is to permit the Milwaukee to continue handling business to and from industries served by the Escanaba and Lake Superior.

Q. Yes, but to do it via the North Western Railroad through Iron Mountain instead of via E. and L. S. through Channing.

A. Well, wouldn't the E. and L. S. get about the same division?

Q. It might, and it might not.

A. On business interchanged with the North Western, as I have seen the figures, they get about the same proportion of freight charges as they do hauling it to Channing.

Q. I do not think they would when the noose was around their neck and this contract was in effect.

Exam. Trezise: What do you mean by that, the divisions might not be proper?

Mr. Burchmore: No. I mean by that, no railroad does very well in adjusting divisions when the parties with which they adjust it have a complete final dictatorial power over what they will pay. That is what I mean.

[fol. 361] The Witness: I am sure the intent you are reading into this was not with us when we drew it.

Mr. Burchmore: I hope it was not, but I think that is the effect, and I think it is. If you will take an industry

in the Escanaba District served both by the North Western Railroad and the E. and L. S. Railroad. The North Western would put a rate in via Iron Mountain that would just cut the E. and L. S. out of everything from that industry.

The Witness: There was, as I recollect it, throwing some light on it, this was put in some time after we initiated it. The North Western thought it was good for the purpose of balancing the traffic. For instance, suppose the North Western should handle all business interchanged with the E. and L. S., we would get a proportion on the fixed percentage that the test period of 1927 to 1932, and this was to enable us to haul a part of our business and do our share of the work (Rec. 715-718).

Exam. Trezise: You may be excused, Mr. Oliphant.

(Witness excused.)

Exam. Trezise: Mr. Sutherland, do you have some more witnesses?

Mr. Sutherland: Nothing more. Unless I have over looked something, but nothing at the moment.

Exam. Trezise: Are you ready Mr. Burchmore?

Mr. Burchmore: We are ready, yes, sir. Mr. Examiner, to shorten the proceeding, to avoid any misunderstanding in our program, we will try to avoid the duplication of testimony put in a year ago.

I intend to call certain of the Officials of the Escanaba & Lake Superior Railroad to give certain statistics and certain facts.

There are quite a considerable number of representatives of the communities along the line of the cities served at each end, who desire to be heard, and for whose particular benefit the hearing was given up here.

I would like to say in the testimony of the Escanaba & Lake Superior Railroad, we shall hope to establish that this railroad, built from Escanaba to Channing was built for two particular or primary purposes. One, on account of the ore traffic particularly, and, second, on account of forest reserves particularly; and, third, of course, the general passenger and freight business that it might have.

Now, we hope to establish by the testimony that the diminishing forest products in conjunction with the loss of

revenue from the ore traffic handled as it has been handled, [fol. 362] will mean the certain abandonment of the line west of Groos, Michigan, if we lose the revenue that we have gotten from the ore traffic.

Mr. Sutherland: Mr. Burchmore, you don't mean revenue?

Mr. Burchmore: I mean income, whatever term I should use. The amount of dollars and cents we have realized as a result of that traffic moving. I am not quibbling at all about the circumstances under which it has moved. If we lose that source of income, that and the diminished forest reserves means that the road must be abandoned, and the gentlemen along the line want to be heard in the adverse effect that this will have on their interests, and I am going to ask you to hear first these interests. They will be as brief as possible, will try to avoid saying the same thing, but after all they are the public that wishes to be heard.

Now, may I call the Mayor?

Exam. Trezise: Mr. Burchmore, this testimony that you have in mind, is to show the effect if the road were abandoned, or is it also to show that it would have to be abandoned?

Mr. Burchmore: Well, it speaks for itself. It goes to both features. It speaks for itself. I say, if I were arguing this, that the Commission is dealing with a matter in rem rather than in perosnem. It is the utility itself rather than the owner of the utility that is on trial.

The question is whether this utility, to which, a railroad line between Escanaba and Channing, will continue to exist as a utility with the loss of one of the two major uses it has, and the revenues therefrom, which it has had, and the revenues therefrom if that is to be the result, and we believe we will prove it will be the result.

Then, how will the public be affected? These gentlemen will tell you that.

Exam. Trezise: I was just trying to guard against having testimony to the effect what would be the result if it were abandoned, without the proof to show that it might possibly have to be abandoned; and I am sure you are taking care of that.

Mr. Burchmore: I think abundantly so.

Exam. Trezise: At least that is going to be your attempt, I should have said, Mr. Burchmore (Rec. 720-723).

[fol. 363] M. H. Doyne, being first duly sworn, testified as follows:

Direct examination.

By Mr. Burchmore:

I have had experience in making studies related to efficiency of transportation methods. Our firm were employed to make an investigation and to report on the terminal facilities at St. Louis and East St. Louis, with a view to the suggesting a rearrangement of those faciilties to expediate the movement of traffic through the terminals, and lessen the cost of handling that traffic. I was retained by the Louisiana Public Service Commission to make similar studies at New Orleans, and a few years ago we were retained by the Canadian Pacific Railroad to make studies of a similar character at Montreal, Canada. Those studies involve transportation service mainly and not the mere matter of maintenance and location of tracks. It was a matter of determining how existing facilities might be rearranged or changed to provide more economic and efficient operating conditions (Rec. 785-786).

I have gone over the testimony and exhibits given by the witnesses for the applicant carrier at the last April's hearing. I found that there was not sufficient data included therein to permit what might properly be called a critical analysis. I have made some general observations, however. I do not believe it would be possible with the data supplied to make a constructive analysis of that showing (Rec. 785-786).

Exhibit No. 2 and Exhibit F-2 which are identical, show, in a general way, the rerouting of ore traffic both the pooled traffic and other non-pooled traffic between the Menominee Range and Escanaba (Rec. 787).

This rerouting may be grouped into three divisions. They are, first, of all, the movement of traffic from the Amasa district, the present route from Amasa to Channing which is shown in yellow colored lines on this exhibit, F-2, is 20.2 miles, and the present route of this Milwaukee traffic from Channing to Escanaba via the purple or lavender colored route is 64.0 miles, making a total distance via the present route of 84.2 miles (Rec. 787).

The proposed route for this traffic from Amasa to Channing remains unchanged, and is 20.2 miles. The proposed

route from Channing to Iron Mountain, continuing along the yellow line instead of via the purple line is 24.1 miles, and the proposed route from Iron Mountain to Escanaba via the red colored line is 52.6 miles, making a total distance for the proposed route of 96.9 miles, indicating an excess in the mileage for the proposed route of 12.7 miles (Rec. 787).

[fol. 364] From the Iron Mountain district the present route to Channing from Iron River via the Milwaukee, and that color is, it looks like blue or black, it is hard to tell here, is 34.4 miles. That is partly by the blue line or black line, and the brown line and yellow line from Iron River to Channing, and from Channing to Escanaba via the purple line is 64 miles, or a total distance of 98.4 miles for the present route of the Milwaukee traffic (Rec. 787-788).

The proposed route from Iron River to Iron Mountain via the red line is 37.8 miles, and from Iron Mountain to Escanaba via the red line 52.6, or a total of 90.4 miles, indicating that the proposed route is shorter than the present for that traffic by eight miles (Rec. 788).

Then taking up the Crystal Falls district, the present route from Crystal Falls to Channing via the brown line and the yellow line, shown on Exhibit No. F-2, is 11.8 miles, and from Channing to Escanaba via the purple line is 64 miles, or a total distance of 75.8 miles (Rec. 788).

The proposed route from Crystal Falls to Iron Mountain via the red line is 27.6 miles, and from Iron Mountain to Escanaba via the red line 52.6 miles, or making a total distance for the proposed route of 80.2 miles, indicating an excess over the present route of 4.4 miles (Rec. 788).

Now, in the testimony offered, there is the assertion that the proposed plan produces the best results, and Exhibit No. 6 was introduced to indicate the dollars of saving that would accrue to both roads if the plan should be put into effect (Rec. 788-789).

The testimony of Mr. Hand at page 24 of the record explaining the plan, states that various schemes were considered for pooling this ore traffic, but there is nothing in evidence indicating what these other plans were, and how the savings resulting from each plan might compare with each other, or with the proposed plan (Rec. 789).

It would seem that any rearrangement of the use of railroad facilities on such a large scale as is here proposed, which would be highly desirable, if not, in fact, actually

necessary to include in the evidence the results of the studies of other plans. In this way the Commission and all interested and affected parties would then have available all of the information needed to reach a final conclusion as to whether the proposed plan, or some other plan would pro-
[fol. 365] duce the best results from the public viewpoint (Rec. 789).

The testimony is somewhat indefinite as to what factors were used as a measuring stick by which to determine the so-called best results (Rec. 789).

Apparently no consideration was given to the effect of the proposed plan upon the Escanaba and Lake Superior Railroad and the public in the territory served by it. It being a part of the present transportation facilities employed in the movement of ore, its disuse for that purpose should enter in the calculations, and considerations forming the data upon which any conclusion is based. It should be treated no differently from any other item or facility now devoted to the service (Rec. 790).

For example—the foundations of the Milwaukee dock are considered to have a substantial value if utilized in the rebuilding of the dock. However, as the proposed plan contemplates the abandonment of the use of the dock for its present purpose, the value of these foundations is taken into the calculations in arriving at the cost of making the change by amortizing the value of these foundations (Rec. 790).

The contract in paragraph 12 page 3, does not agree with the last statement. That was explained on page 32 of the record in the testimony of Mr. Hand in his direct examination. As modified by that testimony under paragraph 12 the Milwaukee Railroad is getting a credit for the value, not the salvage value, but the value that dock would have in rebuilding a new dock and yet that dock is not to be utilized in building a dock unless a new dock is built by the Milwaukee. Under the plan the Milwaukee dock would not be rebuilt but even so, with the North Western building the new dock, the Milwaukee is to be credited with an amount equal to what the foundation of its docks would be worth if utilized (Rec. 790-792).

The Escanaba and Lake Superior Railroad also has a substantial value if utilized in the transporting of ore. If this use is to be discontinued, as a part of the same plan which provides for abandonment of the Milwaukee dock,

then the value of this facility for that purpose should also be taken into the calculations, if a true comparison is to be made between the actual cost of the present method of transporting the ore and the true cost of a change in the method (Rec. 792).

[fol. 366] In other words, if a true comparison of the cost and economics of the present method and some proposed new plan is to be had, then all of the factors and elements in each plan must be taken into account. The evidence does not include such comparisons (Rec. 792-793).

From an examination of Exhibits 2 and 4, it appears that it might be possible to effect by the unification of operations at the mines, and also possibly at the unloading docks at Escanaba. It appears also possible that some economies in transporting the ore via two existing shorter routes, rather than the one proposed longer route, might be affected, and with greater economies, than under the present method of transporting this ore (Rec. 793).

A plan might be worked out that would result in each road transporting a portion of the ore, that would involve less use of foreign tracks, than is suggested under the proposed plan (Rec. 793).

The greatest estimated savings claimed by the applicants would come from the unification of dock operations and mine switching service. The figures submitted in Exhibit 6, or the testimony relating thereto, fail to disclose sufficient figures or facts to justify that a more economical arrangement will result by discontinuing the use of the Escanaba and Lake Superior Railroad by the Milwaukee and transferring all road haul service to the North Western from Iron Mountain to Escanaba, between which two points two separate railroads will have to be used, and by that I mean the two railroads colored in red between Iron Mountain and Escanaba (Rec. 793-795).

My brief investigation disclosed that the Escanaba Iron Mountain & Western road was used substantially only in the transporting of ore eastbound during the ore shipping season, and it was not open for all traffic throughout the entire year. The movement of empties back towards the range was carried on and is carried on by the lower of those two red lines, and not back over this same road. This lower of two lines going through Powers and Hermansville, is a line over which passenger and general freight service is maintained (Rec. 795-796).

Eliminating estimated savings resulting from unifying dock operations and mine service, the estimated savings are as follows:

From Exhibit No. 6:

Abandoning use of Escanaba and Lake Superior by Chi- [fol. 367] cago, Milwaukee St. Paul and Pacific $76,845.00 per annum; abandoning use of Crystal Falls-Amasa Branch of Chicago and North Western $4,281.00, per annum;—total $81,126.00. Total estimated savings—all operations, $200,-351.00 (Rec. 796).

There are no offsetting charges to reflect the increased maintenance of way and other expenses that each road will experience by reason of the increased traffic over certain portions of its respective lines, over and above its present normal costs under existing conditions, or methods of operation (Rec. 796).

Referring to Exhibit No. 1, particularly paragraph number 34. The contract between the two roads provides that no specific rental shall be paid by each to the other for the use of its road bed and transportation facilities, except to divide equally the savings that is a portion of the Milwaukee's expense for use of the Escanaba and Lake Superior Railroad (Rec. 796).

In effect this provision requires the Milwaukee to pay the North Western the same costs (as it paid to the Escanaba and Lake Superior) for the privilege of sendings its traffic via the North Western line; and it requires the North Western to pay the Milwaukee 50 per cent of this amount for the privilege of sending its traffic via the Milwaukee lines. Or it might be the North Western simply offered to handle the Milwaukee traffic for half of the amount that it was required to pay the Escanaba and Lake Superior Railroad. No effort was made to ascertain what would be a fair charge for each to make. That is a direct statement made, I think by Mr. Hand, to that effect (Rec. 797).

There is really no saving in this estimated cost of $76,-845.00 in the sense that the expenditure will be eliminated, as in the case of the $109,000.00 saving claimed from joint operation of the docks. It will merely be paid out to another agency in this case the North Western (Rec. 797).

The Milwaukee will also receive compensation from the North Western for the use of its road bed and tracks be-

tween Amasa and Iron Mountain, represented theoretically at least, by part of the portion of $76,845.00 designated saving (Rec. 797).

[fol. 368] There is nothing in the evidence to show that either road will be adequately or reasonably compensated by the other for the use of property devoted to the service of the other. An equal division of the $76,845.00 may result in either one or both receiving too much or too little.

A determination of the amounts properly due by each to the other, might indicate a total payment in excess of the amount paid the Escanaba and Lake Superior Railroad.

I next come to what I call the foreign line haul that is involved under the present method of handling this traffic, and the proposed plan. For this purpose I am treating the line from Channing to Escanaba over which the E. and L. S. operates as a foreign line. I did it with this thought in mind, that that claimed savings appears to be payments made by the Milwaukee line to some other one for use of part of its facilities, and that being an indication of lack of actual ownership of the property, why I thought that for the purpose of this discussion I would refer to any facilities used, not actually owned, would be in the transporting of this ore, would be considered as a foreign road haul, or the use of a foreign line for which payment has to be made. I note that the Milwaukee traffic from Iron River under the proposed plan must move 90.4 miles over a foreign road (North Western), instead of 64 miles over the Escanaba and Lake Superior, as at present (Rec. 798-799).

Milwaukee traffic from Crystal Falls district under the proposed plan must move 80.2 miles over a foreign road (North Western), instead of 64 miles over the Escanaba and Lake Superior Railroad as at present.

Milwaukee traffic from Amasa under the proposed plan must move 52.6 miles over a foreign road (North Western) instead of 64 miles over the Escanaba and Lake Superior Railroad. However, the proposed foreign line movement in this instance is over two separate railroads with separate rights-of-way.

The North Western traffic from Amasa under the proposed plan must move 44.3 miles over a foreign road (Milwaukee), instead of no foreign road, use under present conditions.

The North Western traffic between Amasa and Crystal Falls under the proposed plan must move about 18.0 miles over a foreign road (Milwaukee), instead of no foreign [fol. 369] road use under present conditions (Rec. 799).

Exhibit No. F-7 analyzes the traffic of the years 1929 to 1934. The figures there shown were taken from previous exhibits introduced in the hearing a year ago, marked numbers 25 to 30, inclusive, which show the tonnage hauled from the various mines and districts via the North Western and via the Milwaukee Road (Rec. 799-800).

For example, on the first page of this Exhibit No. F-7, I have shown Milwaukee traffic, and at the top of the page, that originating or coming from the Iron River District, and in the first column at the left is shown the year for which the traffic was moving, and the second column shows the tons of ore, and then the two columns at the right of which page under general heading tons miles, the left column of these two, shows the result obtained by multiplying the number of tons by the so-called foreign haul of 64 miles, under the present method of handling the ore, and the last column shows the result obtained in ton miles by multiplying the number of tons for each year by the distance 90.4 miles, being the movement over the foreign line so far as this traffic is concerned, the movement over the North Western Railroad, Iron River to Escanaba. Those computations are shown and carried out for each year, and shows that 36,926,321 ton miles of foreign haul will be involved for that traffic under the proposed plan, as compared with 26,142,528 ton miles under the present plan (Rec. 800-801).

Similarly, the figures for the Crystal Falls district were computed, and show the yearly average for the six years involved of 11,666,320 ton miles of foreign haul, under the proposed, plan, as compared with 9,309,781 ton miles under the existing method of handling the traffic (Rec. 801).

On the second page of this exhibit is shown the tonnage at the top and the ton miles or foreign haul from the Amasa district, and that indicates that the yearly average ton miles of haul over foreign lines, under the proposed plan would be 5,642,954 ton miles, as compared with 6,865,952 ton miles under the present method of handling the traffic.

I have indicated on the form the North Western traffic that would move from the Amasa district, but for the years

[fol. 370] involved those particular exhibits from which the information could be obtained failed to disclose that any ore moved from the Amasa district to Escanaba via that line. However, the comparison would be on the basis of no foreign haul to 44.3 miles of foreign haul (Rec. 801).

On sheet number 3 of this exhibit, I have summarized the information shown on sheets one and two, and this indicates that the yearly average haul under the proposed plan, that is, via the foreign lines, would be 54,235,595 ton miles as compared with 42,318,261 ton miles, under the present method of handling the ore or in excess, over the present of 11,917,338 ton miles (Rec. 801-802).

Now in addition to the ore tonnage included in these tabulations there would be a further increase in the ton miles of haul over foreign lines to reflect the movement of non-pooled tonnage to be handled also without any specific rental charge (Rec. 801).

The $76,845.00 average annual payment to the Escanaba and Lake Superior Railroad represents not only rental for the use of the road, but certain other costs, that is maintenance of way and structures not due to use, and general expenses. The Milwaukee and the North Western will each be required to pay for the maintenance etc., due to use for traffic moving over the other's line, in addition to the amount received as rental charges that is the division of savings. These additional charges will be on the pool percentages for example, 34 per cent for the Milwaukee.

In the absence of a very careful analysis of all these factors, it is not possible to say whether all the costs entering into the transporting of this ore will aggregate a smaller or greater total than the costs under existing conditions, or under some other plan (Rec. 802-803).

The data so far submitted in evidence is lacking in very vital information bearing on the relative economies, offered by one route as compared to some other route (Rec. 803).

For example, in addition to paying the North Western half of $76,845.00 the Milwaukee will pay also for the maintenance of way and structures due to use, and for some general expenses. This maintenance of way expense, based on the ten year average adopted in preparing the pool percentages used in the contract, amounted to $47,632.00 per year (Rec. 803).

[fol. 371] This represents a unit cost of .05348 cents per ton mile using the haul via the Escanaba and Lake Superior

Railroad as 64 miles. Net foreign haul under the proposed plan based on the tonnage figures for 1929 to 1934 would average 54,235,000 ton miles of pooled traffic, that is all Milwaukee tonnage, per year. But as this represents less than half of the average annual tonnage of 1,391,443 used in the contract to arrive at the various percentages, it is reasonable to assume that the ton miles of foreign haul would be increased in proportion to the tonnage.

With this assumption the average annual foreign line haul would be about 110,000,000 ton miles. If we assume further that the unit cost for maintenance of way and structures due to use under the proposed plan would be the same as for the ten year period used, the additional payment by the Milwaukee for this item of cost would amount to $58,828. per year for its share of the pooled ore traffic (Rec. 803-804).

I believe these assumptions in which I have indulged are reasonable. Those are the costs which have to come into the pictures somehow or other. The facts that would enable us to determine these circumstances and conditions instead of assuming them are ascertainable by study and the contract seems to provide a basis on which information of that sort will be available (Rec. 804-805).

Now, this payment which I just referred to, or this estimated payment, is the payment that would be made by the Milwaukee. The North Western also would have to pay to the Milwaukee an amount computed in a similar manner for the ton miles of pooled ore traffic moving between Amasa and Iron Mountain, that is the tons multiplied by 44.3 miles (Rec. 805).

In addition each company would have to pay to the other additional amounts representing the expense for maintenance of way and structures, etcetera, due to use, for the non-pooled traffic of each that would move via the other line.

The Milwaukee would increase its cost of maintenance of way and structures, etcetera, on the section of its road between Channing and Iron Mountain, or Antoine, as a result of diverting all the traffic now moving over the Escanaba and Lake Superior Railroad to the North Western via Iron Mountain.

[fol. 372] (Exhibit No. F-7, Witness Doyne, received in evidence.)

From all the data in the exhibits and oral testimony of record, it is not possible for me to compute or estimate what actually would be paid by the Milwaukee to the North Western in lieu of the 76,000 odd dollars the Milwaukee is paying to the E. & L. S. I believe it is possible to get a reasonable estimate of the amounts that would have to be paid under this proposed plan (Rec. 805-806).

One of the factors that would have a tendency to increase the maintenance cost is the use of two railroads between Iron Mountain and Escanaba for the movement of the ore, and the empties, as compared to the use of a single line railroad now by the Escanaba and Lake Superior Railroad. The greater distance to be travelled over foreign lines might have a tendency to increase the costs of maintenance to be paid for by the Milwaukee and under present conditions, especially in view of the fact that part of the maintenance directly attributable to use of the facilities will have to be paid for, for its proportion of the tonnage on 100 per cent of that cost to the North Western, whereas under the present plan the Milwaukee pays the E. and L. S. Railroad only about 80 per cent of that cost (Rec. 806-807).

Then, of course, the condition of the two roadbeds, and the relative effect of the physical conditions of those roads on the maintenance costs, is something that would enter into the calculations. Just how that would affect it would be impossible to say, without making a more intensive study than I have had an opportunity to make (Rec. 807).

There are no concrete facts and figures presented in the record with respect to train costs and as to the number of cars per train hauled over the respective routes. The number of cars hauled per train over the line from Iron Mountain to Escanaba and the need for helper engines service over part of that road, would naturally increase the costs, for helper service was resorted to. If more cars per train can be handled from Channing to Escanaba over the Milwaukee route than via the Escanaba, Iron Mountain and Western from Iron Mountain to Escanaba, that would materially affect the cost of the two routes. As an illustration, if we assume first of all that the same num- [fol. 373] ber of tons of cars or ore would be moved via either route, which is not the case, but as is the case in the movement over the North Western, helper service is necessary, the extra cost of that locomotive would tend to in-

crease materially the cost per car or per ton of ore handled. Of course, if the tonnage were less, as I believe it is via the North Western, that is the total capacity that can be moved, why that would further tend to increase the cost of transporting that ore.

My recollection is that the tonnage rating via the North Western between Iron Mountain and Escanaba is about 15 per cent less than the tonnage rating via the E. and L. S. Railroad between Channing and Escanaba (Rec. 807-808).

I do not recall any specific figures in this record as to what actually has been the train tonnage by the two routes per train (Rec. 808).

Without regard to the merits of the pooling plan proposed by the North Western and Milwaukee Roads, I believe that a plan would be feasible in and of itself whereby the switching and assembling service on the Menominee Range was coordinated, the dock and terminal services at Escanaba were coordinated or unified, and the line-haul movement of the ore from the Range to Escanaba was conducted over two routes, part of the ore moving via Iron Mountain and the North Western rails and part moving via Channing and the rails owned by the Escanaba and Lake Superior Railroad, the earnings from the traffic to be divided according to an agreed method of division. Without additional information I could not say whether such a plan would be more or less economical and efficient than the plan proposed here (Rec. 809).

Generally speaking the information that would be needed to determine the merits of such a plan might be divided into four major groups:

The first group—that dealing with the physical characteristics of the routes to be compared, such as alignment, grades, passing track locations (if single line route), character of road bed and conditions of same.

The second group—investment in Road Accounts or value [fol. 374] for the routes or portions of routes to be compared.

The third group—Average annual expenses for the routes or portions of the routes to be compared for;

(a) Maintenance of Way and Structures.

(b) Taxes applicable to the fixed property.

(c) General expenses to be opportioned on the basis of use.

The fourth group—Transportation costs per unit such as car mile for handling all traffic over the present routes, that is both via Iron Mountain and via Channing, for the road haul exclusive of the terminal operations at each end of the line (Rec. 809-810).

The data in these groups would in turn have to be broken down to reflect the information by zones to permit of a detail analysis. For example, the characteristics of the line between Iron River and Channing would have to be compared with the physical features of the line from Iron River to Iron Mountain. Likewise a comparison of the physical conditions as affecting fixed charges, rental, and maintenance and operating costs would have to be made between the Escanaba and Lake Superior Railroad on the one hand and both lines of the North Western between Iron Mountain and Escanaba, on the other hand (Rec. 810-811).

Another comparison of the physical characteristics would be of the North Western line between Crystal Falls and Iron Mountain with the Milwaukee line between Crystal Falls and Channing (Rec. 811).

Still another comparison would be between the North Western's line from Amasa to Iron Mountain via Stager and the Milwaukee's line from Amasa to Channing (Rec. 811).

Similarly the investments in Road Accounts, or the value of the property, involved in the respective routes to be compared would have to be broken-down into a number of zones for each routes (Rec. 811).

Maintenance and transportation costs would have to be separated in a similar manner. In fact some such segregation of information is made a requirement of the contract for the pooling of the ore, for the route proposed. This is provided for in paragraphs 35, 36 and 43 of proposed contract, which specify how the cost records shall be kept (Rec. 811).

[fol. 375] In the absence of anything in the record showing specifically that such alternative plans had been considered I must conclude that no consideration was given to anything of that sort.

I did find a statement in the testimony of Mr. Hand that "We each looked over our respective facilities and considered various schemes."—That is taken from page number 24 of the record of the testimony—but no mention anywhere is made indicating what these "various schemes" were (Rec. 812).

In order to compare the economies that could be expected from the proposed plan with those of any other plan, all the factors entering into the computation would have to be known. For the proposed plan not all the factors have been ascertained, or at least were not known at the time the plan was submitted in evidence about a year ago (Rec. 812).

I draw this conclusion from the following testimony of Mr. Hand—shown on page 32 of the record—"As compensation for the use of other North Western property, that is trackage and other facilities over which pooled traffic will be handled, no effort was made to determine any rate of return or valuation, but instead the compensation adopted is a division of the savings that could be made by the Milwaukee in discontinuing its operations over the line it now uses." From this statement it seems fair to conclude that the value of or investment in any other alternative route was not considered (Rec. 812-813).

Recent inquiry indicates that the past experience in maintenance costs for the respective zones into which the proposed route is to be divided has not been ascertained. Consequently no comparison of such costs could have been made for any alternative route or routes (Rec. 813).

If the iron ore is pooled and moves via the red route, shown on Exhibit No. F-2, which is entirely North Western from Iron River and Crystal Falls to Escanaba, presumably the Milwaukee Road will not have any iron ore from Iron River and Crystal Falls to Channing, which means that the Milwaukee Road from Iron River and Crystal Falls to Channing will have less traffic than it has had in the past. I found nothing in the evidence to indicate what additional traffic would be left on those lines but the loss of ore traffic might create a deficiency in earnings that would have to be made up on other traffic, or else the lines be abandoned (Rec. 813-814).

[fol. 376] Cross-examination.

By Mr. Sutherland:

The total of the tonnages shown on Exhibit No. F-7 for 1934, would not be the same as the figures introduced by the railroads and the discrepancy comes about by reason of the figures shown for the Crystal Falls District for 1934. Instead of 99,467 tons, that figure should be 227,669, and the effect of that on this Exhibit would be to increase the average foreign line haul over the proposed route above what I have shown, and would make the yearly average for all the traffic slightly greater, but would not affect the conclusion which I stated (Rec. 814-815).

In Exhibit No. F-7 I only refer to tonnage originating and moving on the Milwaukee in which a foreign line haul is involved. I call the North Western a foreign line in this pooling arrangement, because on the premise I started with, that where one road has to pay another for the privilege of using its facilities, I would characterize those facilities used in that way as a foreign line movement.

The Milwaukee and the North Western do more than just divide the cost of maintaining one railroad. The Milwaukee, as I understand it, must pay the North Western in addition to dividing those costs, must pay for the maintenance expenses and other similar expenses directly attributable to the use of the road.

Q. Isn't the fact this, that the maintenance costs of that road is figured and then divided between the two? It is hardly correct to say, if you say that the North Western pays the Milwaukee, the Milwaukee also pays the North Western doesn't it; all that they do is to take the cost of the maintenance and divide it. You do not mean that the Milwaukee pays the North Western something in addition to their proportion of that maintenance, do you?

A. Well, perhaps I can explain it better by referring to Exhibit No. F-6 introduced yesterday. The estimated savings of $76,000 incorporated into the contract. On page 11 under paragraph 51 of the contract, there is an item there on Milwaukee operations over Escanaba & Lake Superior Railroad. It says: "Maintenance of Way and Structures not due to use determined in accordance with A. R. E. A. formula, $41,950.00." That is part of the $76,000 of the

savings, and is only part of the total payment by the Milwaukee to the E. and L. S. shown on Exhibit No. F-6, in the column headed Maintenance of Way and Structures, C.M.St.P.& P. Proportion, which is $89,582. The difference between this $41,950 and $89,582, or some $47,000, is for the maintenance of way expenditures directly attributable to the use of the railroad. The Milwaukee must pay the North Western, for example, an amount computed in the same way as this $47,000 for its proportion of the use of the North Western rails.

[fol. 377] Q. In other words, it divides the saving with the North Western, if the Milwaukee makes a saving there it divides that saving with the North Western, is that what you say?

A. No. That is not what I say. The Milwaukee now pays, for example, the E. & L. S. Railroad some $47,000 over and above the $41,000 shown in the contract. The comparison I attempted to make, for illustrative purposes only, was that [fol. 378] if the maintenance costs were identical per ton mile on traffic handled over the North Western, for example, as over the E. and L. S. Railroad, that on the same amount of tonnage involved the Milwaukee would have to pay $58,828, as compared to the $47,000 it now pays the E. and L. S. Railroad, just for the pooled traffic, and some additional amount for any other traffic that it would have to move over the North Western line (Rec. 816-818).

In my study of pooling mines switching and the dock facilities at Escanaba, I could not reach a definite conclusion as to what should be done about the road haul but it appeared from the study I was able to make, that it might be very well developed with a careful analysis that the two routes might prove more economical, than diverting all traffic over one route, because of the other factors which enter into costs, that is, the payment to other railroads for greater use of their facilities than is now involved in the payment of one railroad to another (Rec. 819-820).

I recall hearing testimony that the pooled route between Iron Mountain and Escanaba would in effect furnish a double track arrangement and that if the ore were pooled over a single route there would be difficulty in handling the ore in one direction, and the empties out of there over a single track route, but I tried to get some information as to the number of trains of ore handled in any one day, the

maximum number, and the hauls. It is the actual movement and number of trains that would determine whether or not a single line with the properly spaced sidings can take care of the traffic, and it might well develop that a double track line, while it theoretically has the same capacity for handling traffic, that extra capacity might merely be academic, and of no practical need in the movement. That would depend upon the extent or volume of the tonnage.

It is true the pooling plan was based on an average of a ten-year tonnage.

Q. And the testimony shows that if that was to be the average tonnage, a double track line would be needed, do you recall that?

A. I do not recall specifically that that was said. But I do recall that reference was made to the fact that this would be in effect a double track line with much greater capacity (Rec. 821).

Now, in order to test the necessity for greater capacity than is now available under the existing method of handling the traffic, it would be necessary to know something about actual movement and I was not able to get that informaton (Rec. 820-822).

[fol. 379] In my direct examination I said that apparently no consideration was given to the effect of this plan upon the E. and L. S. Railroad. As I look at it, if this is a plan that contemplates improving the facilities and methods for transporting ore between mines and docks, that all of the facilities now used in that service must be taken into consideration and the effect on all of those facilities weighed against the benefits or advantages or disadvantages that might result from any proposed change. I do not mean by [fol. 380] that that the plan should not be given consideration if it produced economies for the applicants, but had the opposite effect upon the finances of the E. and L. S., but what I mean is that if we are to get a true picture of the costs involved, and the economies to flow, the economies would be those resulting from the use and disuse of all existing facilities now a part of the service (Rec. 822-823).

I would not conclude that merely because one of the applicants would save a certain amount of money from this pooling plan, but that the E. and L. S. would thereby lose, that the plan should not be put into operation, because that

hypothesis is limiting the considerations that I think should be given to a matter of this kind, because it is not merely a matter of the dollars and cents. There are other factors involved in making the changes of a nature as large as this. I do not contend that the pooling plan should not be put into effect merely because it might have disastrous financial effects upon the E. and L. S. I had not even thought of it in that light (Rec. 823-824).

I stated that the value of the E. and L. S. should be considered in a pooling plan. By that I mean as a transportation facility in a similar way in which the value of the foundations of the Milwaukee docks were taken into consideration. I do not believe that the matter of ownership in a public utility of that character should enter into the question, so long as it is used in that service. I do not contend that a pooling plan should be substituted which would use the route of the E. and L. S. but I say that a plan which might continue the use of that route ought to be considered and compared with the one proposed (Rec. 824-825).

I do not think that the pooling of the equipment would be in any wise affected or materially affected by the route over which the traffic would be moved between the two ends of the line. They might pool the operation at each *of* end of the line and in that way work out a pooling of the equipment and still have two routes if it worked out, that that would be the most economical way of handling it (Rec. 826).

I have given no consideration to the ore produced at Iron Mountain and several stations between that point and Escanaba such as the Norway field, because that would move substantially as now handled and would not be affected one [fol. 381] way or the other in calculations developed here to show what the effect would be of changing the routing (Rec. 826-827).

I know of no way in the absence of a pooling plan that the Milwaukee would have the right to demand the use of the North Western docks. I do not know whether under the Interstate Commerce Act the Commission could compel the joint use of facilities (Rec. 827).

I did not give the mileage from Iron Mountain to Escanaba via the present Milwaukee route. It would be 88.1 miles and the mileage via the North Western or proposed pooling route is 52.6 miles over the two different railroads. The comparison there would be to make it parallel, merely

other illustrations that in that movement the foreign line, or the use of foreign line tracks would be 2.6 miles over each of the two railroads on the North Western, or the proposed route as compared to 64 miles over the E. and L. S. Railroad as at present (Rec. 827-828).

The bulk of the production in recent years has been in the Iron River District. From Iron River to Escanaba via the North Western the distance is shorter than via the Milwaukee, but again there is this question of the greater use of foreign tracks, and there you would have entire distance of 90 miles of foreign line haul. The actual cost of moving ore, leaving the foreign line out of it, has some relation to mileage, if all other conditions were the same; but via this proposed route there is a heavy grade between Sturgeon and Leaper on the North Western, where the helper service must be applied; and that might very well offset the cost and very well offset the eight miles further by the other route (Rec. 829).

Q. Well, of course, you heard the testimony yesterday, that we had to apply helpers to start ore trains out of Channing, didn't you?

A. I do not recall. It may have been said.

Q. It is my recollection that it was so stated, that when you have a tonnage train out of Channing, there had to be a helper to start it out of Channing, to push it up on the E. & L. S., so to some extent there would be some similarity?

By Exam. Trezise:

Q. Well, when you had a hundred cars you said you had a helper.

A. Well, the fact is whether that helper service is just used for a few minutes or several hours.

Q. You mean several miles?

A. I am talking about time. All helper service cost is computed in engine crew hours.

Q. You, as I understand it, while you have made reference to the savings in connection with the dock, you were not taking any exception to those figures?

A. No, sir. Of course, I have not gone into them, or there was not enough information given to go into them to that extent (Rec. 829-830).

[fol. 382] Redirect examination.

By Mr. Burchmore:

By saying I do not take exceptions to the claimed savings in dock costs, I do not support them. They stand because there isn't enough information in the evidence to permit of any analysis of the figures. I have not been in possession of facts that would enable me to suggest that the figures really are right or wrong (Rec. 830).

As to helper service at Channing, it is recognized that where full trains start out of a terminal there is commonly a necessity for giving them a push. That character of helper service adds practically no cost whatever to haul, or the cost of transporting, because if it is in a terminal where the additional locomotives are available, and you do not have to run them out on the line, away from the engine terminals, there is practically no charge made for that little assistance. There is no analogy between that and the helper service over the Escanaba, Iron Mountain and Western, which I described a year ago. There would be a substantial charge made for the latter character of helper service (Rec. 830-831).

It would appear to me to be wasting funds to put up a concrete dock of large capacity if the ore tonnage were expected to diminish and its volume pass out in the next ten years. If it were concluded that the business would not last very long, I would say that that would be an unwise expenditure (Rec. 831-832).

While a concrete dock is of longer life than a creosote one, creosote timbers on a concrete foundation might very well last 30 or 35 years with ordinary maintenance and repairs (Rec. 832).

The A. R. E. A. formula referred to in the contract between the roads for the pooling of the ore relates to a method of determining what portion of the maintenance expense for road and structure is attributable or varies directly with the use or the traffic moving over the tracks and the rates paid as distinguished from maintenance costs, which result from the elements. It is a theoretical method of computing costs which has been accepted generally by railroads. It relates to matters that would be involved in attempting to distribute maintenance costs, due to use, as [fol. 383] beween the Milwaukee and the North Western,

where they use the same tracks. I do not believe that my testimony on that phase of the matter is in any sense in conflict with that formula (Rec. 833-834).

Within the last few days I requested the applicant railroads for data concerning this double track train service. Some of the information relating to physical characteristics of the Milwaukee Road was made available, such as alignment maps, profiles and so forth. The statistics asked for were not furnished, but as I understood it they were not readily available in the forms in which the request was made, but the data for which it could be obtained, I understood is mostly available somewhere in the records of the company, but would have to be worked up (Rec. 834-835).

Recross-examination.

By Mr. Sutherland:

That request was made last Friday, and I was at the office again on Monday of this week and given everything available (Rec. 835-836).

[fol. 384] L. O. Heintz, being first duly sworn, testified as follows:

Direct examination.

By Mr. Burchmore:

Exhibit No. 16-A, sent in subsequent to the last hearing, contains certain errors. Exhibit F-8, received in evidence at this point, is a correction of that exhibit (Rec. 891-892).

Exhibit F-9 is a statement of comparative income of the E. & L. S. for the year 1935 (Rec. 892).

Exhibit No. F-10 is a detailed statement of income account No. 501, railway operating revenues, and of income account No. 531, railway operating expenses (Rec. 892-893).

Exhibit No. F-11 is an adjustment of the income statements for these several years, to reflect the Milwaukee's joint facility credits under the contract (Rec. 893).

Exhibit No. F-12 is a statement of operating accounts, affected by joint facility credits for the year 1935. It is similar to the other statements submitted for prior years (Rec. 893-894).

Exhibit No. F-13 is a statement of the commodities transported during the year 1931, according to their classifications (Rec. 894).

Exhibit No. F-14 is a statement from traffic records of carload tonnage originated according to origin stations on the line west of Groos. Groos is 2 miles west of Wells (Rec. 894).

Exhibit No. F-15 is a statement classifying the tonnage for stations west of Groos for 1935 (Rec. 894-895).

Exhibit No. F-16 shows earnings of the E. & L. S. on traffic interchanged with the Milwaukee and North Western roads for the year 1935. This statement represents the earnings of the E. & L. S. from interline traffic moving from the E. & L. S. to the Milwaukee and North Western, and traffic from those roads to and from distant east and west points. It includes no revenue from iron ore. No iron ore moves in connection with the Milwaukee. The figures include all joint traffic of all classes moving to and from these two connections, except as to inter-terminal switching. The statement shows about $70,000 of revenue from this traffic and the Milwaukee and North Western earned much larger [fol. 385] additional sums on the same traffic on their connections. This shows only the E. & L. S. proportion of the earnings, according to its books (Rec. 896-897).

This is the traffic, as far as the E. & L. S. is concerned, that the other two roads proposed to pool under paragraph No. 52 of the proposed contract. It does not include ore as to the Milwaukee. There is some ore coming from the North Western and Soo lines to the furnace at Wells. The latter moves under through rates of which the E. & L. S. receives a portion. It comes from Ontonagon and Ishpeming on the Marquette Range. Most of that came Soo Line (Rec. 897-898).

Cross examination.

By Mr. Sutherland:

The pooling plan relates only to ore going through the dock. That other ore does not hit the dock but is interchanged before it reaches the dock (Rec. 898).

The E. & L. S. declared 10 per cent dividends in 1934 and 1935. Since 1923 there was one year in which they did not declare a dividend, and in other years the dividend has been

5 per cent, but for the majority it has been 10 per cent (Rec. 899).

I have not given the pooling contract very much study. I do not understand that the plan contemplates any effect on the E. & L. S. revenue, but this balance revenue which the North Western and Milwaukee will get represents an amount in which the E. & L. S. will be vitally interested in the end (Rec. 900).

[fol. 385-a] M. H. Doyne, recalled as a witness, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Burchmore:

This morning, when I testified about the figures appearing in Exhibit No. F-7, I made reference to a change that should be made in the total tons of ore moving from the Crystal Falls district shown on the first sheet of that exhibit (Rec. 920).

That figure should be as I said this morning, 227,667 tons, which would have the effect of increasing the ton miles of movement over the present foreign haul group and the proposed foreign haul group. The effect of that change on the last page, or the summary, would be as follows (Rec. 920):

The yearly average would be as follows, with that correction, the present would be changed from the figure shown to 43,702,395, and the yearly average for the proposed column would be 55,779,201; and the yearly average for the excess would be 12,076,806 (Rec. 920-921).

Now, I have just found some figures for the movement from Iron Mountain, and I will read those as I have them:

For the year 1929, the tonnage was 313,201; for the year 1930, the tonnage was 313,212; for the year 1931, 1932 and 1933 there was no tonnage moved. For the year 1934 there was 99,467, or a total for the six year period of 725,880 tons, which gives an average per year for that six year period of 120,980 tons from the Iron Mountain District (Rec. 921).

Now, then, if we add that figure, I would call it in round numbers 6,365,000, in round numbers, and the figures which I read as revised on the last page of Exhibit No. F-7, the new total for the proposed foreign line haul, I calculate

55,779,000. Adding those two together would result in a new total of 62,144,000 ton miles for 803,509 tons (Rec. 921).

Now, that 803,000 tons is about, is a little more than half of the normal 391,000 used for the ten year period, the average per year, so that in order to reflect that increased tonnage, I have multiplied the 62,144,000 by 1.75 per cent, which would produce about 110,000,000 ton miles of foreign line haul, which is the figure I stated this morning in my testimony, as indicating the amount of foreign line maintenance expense that would have to be paid for in addition to the [fol. 386] division of the savings, and which at the figure I refer to of a little over a half a mill per ton mile, would amount to some $58,000.00 as compared to the $47,000.00 paid for the average of the ten year period to the E. and L. S. Railroad for a similar maintenance expense. So that the final result of my suggestion is not substantially changed (Rec. 922).

This Iron Mountain tonnage also would reduce the difference between the present and proposed by a couple million ton miles of foreign haul, about 2,300,000, something like that; but the figures that I quote do not have to take into consideration the difference between the two routes, but merely the cost per ton mile of any route, and the only thing we were concerned in is in what it would amount to in dollars via the proposed route as compared to what has actually been paid out over the present route (Rec. 923).

Cross examination.

By Mr. Sutherland:

I made no computation to show the ton miles of the ore as it moves at present, except for that portion of the haul which is over foreign rails. Exhibit No. F-7 shows the method of handling the ton miles via foreign rails as compared with the ton miles via foreign rails for the proposed route (Rec. 923-924).

Mr. Burchmore: That is all from the Escanaba and Lake Superior Railroad, and by the Escanaba Chamber of Commerce, excepting that we would like to ask leave to file a brief, and to make oral argument.

Exam. Trezise: Mr. Sutherland do you have some further testimony? (Rec. 929.)

[fol. 387] CHESTER E. OLIPHANT, recalled as a witness, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Sutherland:

Referring to the testimony of Mr. Doyne in connection with Exhibit F-7, I do not agree with Mr. Doyne on what he has designated as foreign road haul. I do not believe that this figure is pertinent to the problem in hand, because in the pooling proposition it is a premise that the properties of the North Western and the Milwaukee are one under the pool. In so far as the movement of the ore goes, there is no foreign haul. It is all one haul from the mines to the docks. The only critical figure I could see in this respect would be total ton miles, and that figure I think he had produced for the period of the basis of our study, 1923 to 1932, and even might go beyond that, to contemplate what the rearrangement of tonnage might be in the future, or the immediate fuure, as far as that could be seen; and I personally do not believe there is much difference in the ton miles between the total ton miles in the present or past, and the ton miles as we can see it in the future (Rec. 929-930).

I do not agree with the figures that Mr. Doyne has given as to the effect on cost of maintenance in connection with Exhibit F-7. It appears to me that what we pay to the E. and L. S. and what we have to stand ourselves, will probably cover all of the payments we make to the North Western for the use of their property for maintenance due to use. That was the basis used by me in estimating under the pooling plan. Exhibit F-7 deals solely with Milwaukee traffic and has no North Western figures in it. It is obvious that a so-called foreign haul under the present arrangement, where the E. & L. S. represents the foreign road, would be greatly less than a so-called foreign road haul where the North Western line is considered a foreign road in the pool (Rec. 930-931).

As statistician for the Milwaukee Road, it has been one of my duties to study low density secondary lines with reference to abandonment. It is apparent the population along the line tributary to the E. & L. S. is very weak. The line [fol. 388] was built prior to the use by the Milwaukee out

as far as Watson, as a timber line. I think that with the heavy track that is there, that the E. and L. S. could probably be maintained very cheaply for quite a number of years, at least, at a very cheap price; and the train service could be reduced to the minimum requirements, and the whole line could be operated cheaply. So that it might continue. It might, however, reasonably, in my opinion, be disconnected to Channing, and the first abandonment be made back as far as Northland. It might be that it would become self-sustaining from Northland in as a branch, tributary to Escanaba and Wells (Rec. 931-932).

Whether or not the pooling plan would cut the E. & L. S. out of earnings that it now has from traffic that continues on or comes from the North Western and the Milwaukee, is connected with this other question. If the revenues of the E. and L. S. on the business interchanged at Channing are sufficient, it would keep the line into Channing, beyond, or Northland, or Ralph. If that, however, would not support the line beyond, and the train service, and probably lower taxes, that might be disconnected. That line would depend upon the local traffic into Escanaba and Wells. As far as the interchange business goes, as far as I can see it, the Escanaba and Lake Superior would make very near as much money by interchanging that business at Escanaba or Wells with the North Western or with the Soo Line, as they would make by carrying it 63 miles to Channing and interchanging it there with us, because their divisions are, I think, practically the same (Rec. 932-933).

It is my understanding that the revenues on the interchange business at Escanaba, where the E. & L. S. interchanges with the North Western, would not be materially lessened, and that if the business E. & L. S. interchanges with the Milwaukee at Channing was interchanged with the North Western at Escanaba, it would produce substantially the same revenue as produced when interchanged at Channing. So theoretically the E. & L. S. should lose only the rental from the Milwaukee under the pooling contract. That would, however, depend upon being able to get their proportion of taxes reduced; their expense naturally would go down somewhat to their proportion of the retirement of the Milwaukee traffic. The expense for maintenance should be reduced greatly if this heavy ore traffic is taken off the line (Rec. 934-935).

[fol. 389] No new steel concrete dock will be built unless there is in sight sufficient business to warrant the expenditure. The way things are going now no new construction will be made for several years. One of the remaining North Western docks has a remaining life of 15 years. The other is nearly exhausted but may pull through for several years until there is some indication how the volume of business is going to run. With the present low volume of business, the North Western docks are adequate and the building of a concrete dock will depend upon the showing made by the ore traffic. I think the subject would be exhausted before any two million five hundred thousand dollars is put into a concrete dock (Rec. 935-936).

This pooling matter is a simple problem. If we gave consideration to the rise and fall, to the foot pounds of energy, and such matters, we would become involved in a controversy such that we could never get any agreement with the North Western, so we approach it on a more or less practical basis. The matter has been given the best attention of the best men on both roads over a period of years, and I know of no important factors that have been left out of the calculations. We have said we did not consider them to the extent of setting up a comparative cost statement or anything of that nature, but I doubt if there are any loop holes or matters we have not considered. Finally, after going up all of the blind alleys, we found a plan that would work, and upon which we could reach an agreement, that is the important factor (Rec. 937-938).

Cross examination.

By Mr. Burchmore:

I believe when I testified yesterday I stated that we discovered that this was the only plan which we could put across with the North Western (Rec. 938).

Whether or not a new concrete dock will be built depends upon the mutual agreement of the two roads, and I think that would be reached upon the engineering basis and the facts then obtaining. The prospective economics of the proposition would be worked out thoroughly. Under

the contract, we are not really given the right to decide that question. We had it in there originally and had to take it out (Rec. 939).

During the past ten years, the Milwaukee paid the E. & L. S. about $47,500 a year for the maintenance of way due to the use of 64 miles of line. When I stated the [fol. 390] Milwaukee would not have to pay any more than that to the North Western for the maintenance of tracks, due to use, I had in mind that what we paid the E. & L. S., plus what we stood ourselves on our own property, the part due to use should pass right over to the North Western, theoretically. That is, we are crediting against what we are going to have to pay the North Western, the maintenance that we have stood ourselves on our own tracks. That would be an added expense to them, and theoretically we will be relieved of it (Rec. 940).

We have studied the conditions surrounding the tracks from Crystal Falls and Iron River, and Kelso Junction, and were surprised to learn that the freight revenue, aside from ore, was sufficient to keep that line as a branch line. If that continues to be the condition, we will still have to maintain those tracks, but with lessened use, the maintenance due to use will be lessened. I have no figures on what that maintenance due to use has been on those tracks. I am aware that that is part of the information we were requested by protestants to furnish (Rec. 941).

I would not know whether the E. & L. S. could cut down their present train service and still satisfy the public demand for service by way of Channing and the Milwaukee. We do not object to the result that the service from Escanaba via Channing to Chicago is practically the same service, if not better than that afforded by the North Western. We have tried to make it so. I understand the train schedule of the Escanaba road for merchandise and carload freight was made at the suggestion of the Milwaukee operating department, but have nothing to suggest as to how that train service could be cut down (Rec. 942-943).

As to why, although the matter had been discussed for a long time, the pooling plan was not discussed with counsel for the Escanaba and Lake Superior, we were not sure that the thing was feasible. Why get everybody excited until we were confident that the thing might work and

it was only until we got to approaching the signing of a contract that we were sure the North Western and ourselves could reach an agreement on it (Rec. 943).

[fol. 391] Redirect examination.

By Mr. Sutherland:

It would not require the expenditure of as much money to maintain the line from Iron River to Channing for regular traffic, outside the ore traffic as to maintain it when that heavy ore traffic moves over it. We could reduce the maintenance substantially. One factor would be whether we continued the passenger service or not (Rec. 943-944).

[fol. 392] D. W. Kelly, recalled as a witness, having been previously sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

There are crews working in and out of Channing whose employment has no connection whatever with the ore traffic. There are about six assigned crews operating in and out of Chicago. One crew operates between Channing and Champion, two between Channing and Ontonagon, one on the Iron River line, and two between Channing and Green Bay. In addition, there are about four extra trains every week operated via the Ontonagon line or toward Iron Mountain and back, but not toward Champion. The regular service takes care of the latter. That is regular year-around service, wholly separate and apart from the ore (Rec. 944-945).

In the summer of 1935 there were 79 trains operated from Channing to Escanaba and back over a period of two hundred and ten days. This was in addition to the crews just mentioned, so there will be a great deal of employment left in Channing.

On recross examination Witness D. W. Kelly testified as follows:

I do not suggest that 79 trains per annum is representative of the ore traffic for the future. I cannot tell what the future will be (Rec. 946).

The Milwaukee Road does not have anything like its past volume of traffic, freight or passenger, up in this territory. I think under the contract we will probably handle 34 per cent of the ore. I cannot point to any place in the contract providing for that but I think the organizations have a clause where a consolidation is made, that they will take a certain percentage of that tonnage and the mileage. When we handled ore over the Soo Line, our cars operated between Iron Mountain and Gladstone on the Soo Line, and Soo Line cars between Gladstone and Iron Mountain on our line. The Soo Line ran over our line 14 miles and we ran over theirs from Pembine to Gladstone.

Mr. Burchmore: That is all.

Mr. Sutherland: I think that is all.

Exam. Trezise: Is there any further testimony in the case, or any more statements? (No response.) (Rec. 951.)

Exam. Trezise: There will be a proposed report in this case. March 30 briefs will be due. And if there is nothing further, gentlemen, we will close this hearing.

Thereupon, at 4:20 o'clock p. m. February 27, 1936, the hearing was closed.

[fol. 393] Secretary's certificate to statement of evidence omitted in printing.

[fol. 394] EXHIBIT 1

RECEIVED IN EVIDENCE C. E. S. 5/18/35 (Rec. 571 and p. 12)

This agreement, made and entered into this 11th day of April, 1935, by and between the Chicago and North Western Railway Company and the Escanaba, Iron Mountain and Western Railroad Company (hereinafter collectively or severally called "North Western"), and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter called "Milwaukee");

Witnesseth:

Whereas, the North Western owns and operates lines of railroad which extend through and serve territory known as the Menominee Iron Range located partly in Michigan and partly in Wisconsin, in the vicinity of Iron Mountain,

Iron River and Crystal Falls, Michigan, and said lines of railroad extend from the Menominee Iron Range to ore docks of the North Western located in the harbor at Escanaba, Michigan, and the Escanaba, Iron Mountain and Western, a wholly owned and controlled subsidiary of the Chicago and North Western Railway Company, owns a line of railroad which extends from Iron Mountain to the said docks of the North Western at Escanaba, which line is leased to and operated by the Chicago and North Western; the Milwaukee owns and operates lines of railroad which also extend through and serve the territory known as the Menominee Iron Range and operates under trackage rights over the line of the Escanaba & Lake Superior Railroad, from a connection at Channing, Michigan, to ore docks of the Milwaukee also located in the harbor at Escanaba, Michigan, near the docks of the North Western. Both the North Western and Milwaukee own numerous spur, industrial and side tracks, some jointly and some separately, appurtenant to their respective lines of railroad in the territory of the Menominee Iron Range and used for the purpose of reaching and serving numerous iron mines in that territory and for the purpose of switching cars in the handling of ore traffic to and from the mines in said territory. The North Western and the Milwaukee each have yard facilities for the switching of cars handling such ore traffic at Escanaba, Michigan, adjacent to their respective docks. Heretofore each of the parties has separately handled its ore traffic from the Menominee Iron Range to its docks at Escanaba, using exclusively its own motive power and equipment. The ore traffic in question is loaded on lake boats from the respective docks of these two companies and is moved thence via the Great Lakes to destination ports; and

Whereas, the parties have determined that by pooling the entire tonnage and revenue of the iron ore traffic and hauling same from said Menominee Iron Range over the lines of the North Western to and through the docks of the North Western at Escanaba and providing for certain joint services, joint use of motive power, cars and other equipment, and joint maintenance and operation of tracks and other facilities used in handling said traffic, they will be able to improve their service to the public and at the same time reduce expenses, and the Milwaukee will be able to avoid making large capital expenditures for new

docks. This they now propose to do if and when consent of the Interstate Commerce Commission is obtained.

Now, therefore, in consideration of the premises and their mutually dependent covenants hereinafter set forth, the parties hereto agree as follows:

Definition of Range and Future Ore Developments Outside the Range Herein Defined:

1. The term "Range" as used in this agreement means that territory on the Menominee Iron Range along the North Western from Loretto and Vulcan on the east to Crystal Falls and Iron River on the west, and along the Milwaukee from Amasa on the north to Iron Mountain on the south and to Iron River on the west. Trackage and facilities on the Range and limits of the Range herein referred to will be shown on a certain blueprint map to be attached hereto and marked "Exhibit A". Said map, Exhibit "A", shall be supplemented, once each five years to show changes in track layouts.

2. When and if mining operations in the future are opened up on the Menominee Iron Range and ore is produced therefrom outside the limits of the "Range" as herein defined, the parties shall then determine and adopt suitable arrangements supplemental to those herein provided to include such additional lines of railroad and facilities as may be required in the handling of such new tonnage and shall make such other changes or revisions in the arrangement as shall be appropriate.

[fol. 395] Division of Tonnage and Revenue:

3. Ore mined or hoisted on the Range and transported from the Range to the docks at Escanaba shall be pooled, and tonnage and revenue collected thereon divided as follows:

North Western ..... 66 per cent,
Milwaukee ..... 34 per cent,

hereinafter referred to as the "Pool Percentages".

4. All storage, demurrage, dock and other charges, if any, collected on pooled ore shall also be divided between the North Western and the Milwaukee on the Pool Percentages.

5. Revenues on non-pool traffic, handled one for the other, as hereinafter defined, shall accrue and belong to the party for which such traffic is handled. Per-diem or mileage on cars used for such traffic; damage and repairs to the cars; and loss and damage to the contents thereof shall be handled as if the movements were entirely on or over the lines and tracks of the party for which such traffic is handled.

Road Haul Between Range and Escanaba:

6. The Milwaukee shall handle with its road trains and crews pooled ore mined in the vicinity of Amasa, over its line from Amasa to Iron Mountain, and deliver same to the North Western at Iron Mountain. The North Western shall handle with its road trains and crews pooled ore mined elsewhere on the Range from points of production, together with the ore received from the Milwaukee at Iron Mountain, over its lines to the docks at Escanaba. The cost of road haul shall be borne as hereinafter provided.

Supervisory Organization and Procedure:

7. The operations of the parties on the Range in the vicinity of Amasa and in the transportation of ore mined at Amasa to Iron Mountain shall be under the supervision of the Superintendent of the Milwaukee. All other operations of the parties on the Range, in the ore yards and on the docks at Escanaba and in the transportation of the pooled ore between the Range and Escanaba shall be under the supervision of the Superintendent of the North Western. Superintendents shall cooperate in the handling of pooled traffic between Amasa and Iron Mountain. They shall make such reports to both parties as their General Officers may deem necessary.

8. Any special forces required by reason of these pool arrangements and not needed to any extent by either party to handle its ore separately shall be provided at the joint and equal expense of both parties.

Ownership, Maintenance and use of Docks at Escanaba:

9. The docks to be used under this agreement shall be the docks of the North Western, owned by the Chicago and

North Western Railway Company or its subsidiary, the Escanaba, Iron Mountain and Western Railroad Company. The North Western and the Milwaukee each accepts as its primary obligation the duty of furnishing docks and appurtenant facilities for handling its proportion of the pooled ore, but each recognizes that it is not practicable to divide actual ownership of the same in such proportions. The following arrangement, which is intended to distribute the burdens of ownership in said proportions and establish the principles of such distribution, is therefore agreed upon.

10. Beginning with the ore season of 1935, the Milwaukee shall discontinue the use of and abandon its docks at Escanaba. The North Western shall continue the use of its present docks—the dock known as No. 6 as long as it shall remain suitable for handling ore, estimated to be approximately fifteen years, and the dock known as No. 5 during the year 1935, and thereafter as long as the parties agree that it is more economical to do so than to construct a new dock or that the construction of a new dock is not feasible or justifiable by reason of financial conditions. Whenever the parties agree that the construction of a new dock or the rebuilding of an old dock is desirable and feasible, it shall be constructed or rebuilt of such type and capacity as the parties may agree to be the most economical. The North Western shall have charge of the design and construction of said dock but plans thereof shall be devel- [fol. 396] oped in collaboration with the engineers of the Milwaukee and, in general, subject to their approval. Unless otherwise agreed to, competitive bids shall be taken, and after consideration of the bids received a decision reached as to whether the work shall be done by contract or by the North Western. With respect to materials used in such work shipped from points not reached by the lines of the North Western, such materials shall—all other things being equal—be purchased at points reached by the Milwaukee and shipped over its rails to such points of connection on the North Western as the latter road may specify.

11. Commencing with the ore season of 1935, the North Western agrees to handle the Milwaukee's proportion of the pooled tonnage through its present docks Nos. 5 and 6 and thereafter through said docks, any extensions thereof, or any new dock or docks that may hereafter be built in

accordance with the provisions hereof; provided, however, that the North Western shall not be liable for damages in case of any emergency whereunder it may be unable to handle the total volume of ore of both parties, such as might arise from an unanticipated increase in ore production, unexpected disability to its docks or as the consequence of a strike or other similar occurrence, for failure to handle more than the Milwaukee's pro rata proportion, based upon the Pool Percentage, of the total volume of ore that can be handled through the dock during such emergency; and provided, further, that in no event shall less than 88.9% (the relation of the Menominee Range ore to the total ore handled over the docks at Escanaba in the period 1923-1932, inclusive,) of the available capacity of the dock be utilized for pooled ore.

12. Commencing with the year 1935, the Milwaukee shall pay to the North Western for the use of its docks aforesaid the following amounts:

(1) For the use of present Dock No. 6, until abandoned, 30.2% of $32,400 per annum; and

(2) 30.2% of the interest hereafter paid by the North Western on all future capital expenditures incurred in the construction of any new dock or docks or of any extensions, additions or betterments to existing docks provided pursuant to this agreement.

The Milwaukee's share of the pooled ore is 30.2% of the total ore, including ore from the Marquette Range, handled through the docks at Escanaba. This percentage is subject to adjustment as provided in Paragraph 20 hereof.

13. It is understood and agreed that it is the intent of the parties to share all interest and carrying charges incurred on all investments hereafter made in docks used in handling of the pooled ore in the proportions of the tonnage of the parties and that the purpose of item (2) in paragraph 12 is to make provisions therefor so far as interest is involved and that the aggregate of all principal sums on which interest is to be paid under item (2) in paragraph 12 shall be equal to the total amount of the North Western's investment in docks made from and after the date of this agreement and in accordance with the

accounting rules of the Interstate Commerce Commission, excluding interest during construction.

14. Interest on funds used by the North Western that are borrowed expressly for the purpose of constructing any of such docks, or additions thereto, shall be the actual interest paid on such loans. Interest on funds that are supplied otherwise shall be at the actual net rate, including any premium, discount or underwriting charges, paid by the North Western on money borrowed for general purposes on its last loan prior to the time when such funds are used; provided, however, that if such last loan was at such a remote period that the rate of interest shall be out of line with going rates, then the going rate for similar loans shall be determined and used.

15. Payments of the sums under item (1) of paragraph 12 shall be due in equal amounts semi-annually, on January first and July first of each year. Payments under item (2) thereof shall be due ten days prior to the dates upon which the North Western is required to make its interest payments on the loans from which the funds shall have been derived.

16. The Milwaukee shall also pay 30.2 per cent of all expenditures hereafter made by the North Western for taxes, maintenance, insurance premiums, watchman service and fire protection on account of any of the present or future docks or any extensions thereof. Such payments to be due and payable as of the date upon which the North Western incurs such expenditures, or as soon thereafter as bills are rendered by the North Western. It is agreed that as to such bills the North Western shall have the right to call upon the Milwaukee for its proportion of any such expenditure in order that it may apply the payment upon the expenditure, or incur the expenditure in full and there- [fol. 397] after call upon the Milwaukee for reimbursement, as the North Western may elect.

17. It is agreed that the Milwaukee shall reimburse the North Western to the extent of 30.2 per cent of any investment hereafter made by the North Western in docks, dock property and appurtenances hereafter used in handling the pooled ore. Such reimbursement shall be made in equal monthly payments of amounts which, together with

interest at such rate or rates as are established for the purposes of item (2), paragraph 12, compounded annually, will be sufficient in the aggregate to amortize the investment within the period of the estimated life of the structure. If any structure lasts longer and continues to be used beyond the estimated life upon which the sinking funds for amortization of investment were calculated, no further payments shall be made after the investment therein has been fully amortized, either for the purpose of this paragraph or for interest on such investment as provided in item 2, paragraph 12. If any structure does not last as long as its estimated life, or ceases to be used before its estimated life has expired, the residue not covered by the amortization payments herein provided for shall be paid in full when the investment therein is retired. The cessation of ore traffic or the termination of this agreement shall be deemed to amount to retirement of investment, provided that if the North Western shall retain for its use more than its tonnage proportion of docks on which amortization charges have been divided, then the Milwaukee's payment toward the residue not covered by amortization shall be limited to the portion of the docks which could be abandoned. The accrual of depreciation in the accounts of the North Western shall not be deemed a retirement of investment within the meaning of this paragraph. Payments herein provided for, for amortization of investment shall begin immediately upon completion of the work upon which the expenditure was incurred. Investment for the purposes of this paragraph shall be the same in amount as for the purposes of item (2), paragraph 12, and as defined in paragraph 13.

18. The Milwaukee shall pay to the North Western said 30.2% of any cost incurred in the demolition of any docks used under this contract and receive credit for the same proportion of the value of all salvage recovered. For portions of foundations reused no credit shall be allowed for the salvage value nor shall the appraised value for use in new construction thereon be treated as investment for the purposes of this contract.

19. As to taxes, it is agreed that the obligation of the Milwaukee shall be its proportion as aforesaid of such

taxes as are levied and paid on account of the property or the use of the property involved, and that unless the property is separately assessed and taxes separately collected, a fair and equitable proportion of all taxes paid by the North Western on its property in Michigan as a whole, and in which said docks are included, shall be paid by the Milwaukee.

It is further agreed that in event an allocation of taxes becomes necessary, said allocation shall be such percentage of the total taxes levied on the property of the North Western in the State of Michigan as is represented by a comparison of the cost of reproduction new of the present and future docks with the cost of reproduction new of all North Western property so taxed. The cost figures referred to shall be those reported by the Interstate Commerce Commission as of valuation date together with the net additions, betterments and retirements as of December 31st of the year just preceding the levying of said tax, trended to said date by the application of Interstate Commerce Commission cost trends. The first taxes involved under this provision shall be those levied on and paid by the North Western during the calendar year 1935.

All special taxes and/or special assessment taxes against said dock property or against the North Western on account thereof, shall be borne by the Milwaukee in the same percentage as general taxes, hereinabove provided for. In the event a special tax or assessment is levied on a larger piece of property of which said docks are a part, the North Western shall cause a separation or division to be made by the taxing authorities which will fix a specific amount against said docks, and the Milwaukee shall then be liable for its proportion of said special tax or assessment against the dock property.

It is further agreed that upon a change in the present method of taxation in the State of Michigan, the provisions herein as to taxes may be revised and amended accordingly.

[fol. 398] 20. It is agreed and understood that if in the future a change of a permanent nature in the relationship of the pooled to the non-pooled tonnage handled over the dock arises from an increase or decrease in the volume of such non-pooled tonnage which would result in an inequitable division of the expenses in accordance with the

intent of this contract, the percentage employed for the distribution of expense (30.2%) in paragraphs 12, 16 and 17 shall be revised.

Dock Operation at Escanaba:

21. The North Western shall furnish the necessary supervision, labor, material and supplies for handling all ore over the docks and perform all operations incident thereto, including the steaming of ore. The Milwaukee shall bear such proportion of the cost thereof as its share of the pooled tonnage is of the total tonnage handled through the docks. Billing for such costs shall be made monthly, with such adjustment as may be necessary at the end of each year to divide the costs on the basis of the actual tonnage for such year. All operating expenses of whatever nature shall be included in the foregoing, except maintenance, insurance premiums, watchmen service, and fire protection, which are provided for elsewhere.

Operation and Use of Ore Dock Yard at Escanaba:

22. It is contemplated that pooled ore traffic only will be handled through the so-called ore dock yard of the North Western at Escanaba, and the North Western agrees to handle the Milwaukee's portion of pooled ore through said yard. No specific rental other than a share of the savings provided for elsewhere in this agreement shall be paid by the Milwaukee for the use of existing facilities in said yard. It is agreed that the existing facilities have a capacity for the normal and efficient handling of three and one-half million tons per annum and that whenever the volume of ore to be handled through this yard in any year shall exceed this amount additional trackage will be required. When it is needed, the North Western shall construct such additional trackage and thereafter the Milwaukee shall pay the North Western two per cent per annum on the capital expenditures made therefor and shall bear its Pool Percentage (34%) of all maintenance expenditures thereafter incurred thereon. The Milwaukee shall bear its Pool Percentage of the maintenance expenditures recognized as being due to use incurred on all existing facilities in the said ore dock yard from and after the effective date of this agreement. In the determination of

the amount of maintenance due to use, the A. R. E. A. Formula for this purpose shall be employed.

23. The foregoing basis for assigning rental and division of maintenance shall be followed so long as the ore dock yard is used exclusively, or substantially so, for the handling of pooled ore. If in the future traffic other than pooled ore should be handled through said yard to any substantial extent, a pro rata deduction shall be made therefor, and charged to such other traffic.

24. Wages of yard employes and other yard expenses, the principal accounts being 377-Yardmasters and Yard Clerks; 379-Yard Switch and Signal Tenders; and 389-Yard Supplies and Expenses, shall be pooled and borne by the parties on the basis of the Pool Percentages.

Switching at Escanaba:

25. The switching of pooled ore business at Escanaba shall be pooled. The North Western shall furnish crews for and shall perform all such switching throughout each ore shipping season. The total expense of such switching the principal accounts being 378-Yard Conductors and Brakemen; 380-Yard Enginemen; 382-Fuel for Yard Locomotives; 385-Water for Yard Locomotives; 386-Lubricants for Yard Locomotives; 387-Other Supplies for Yard Locomotives; and 388-Enginehouse Expenses-Yard shall be divided between the parties on the basis of the Pool Percentages. Whenever crews assigned to the handling of pooled ore are used for non-pooled business, a proper deduction shall be made for the engine hours devoted to non-pooled traffic. The party for whom such non-pooled traffic switching is performed shall bear the total cost thereof. If non-pooled traffic is handled in conjunction with pooled traffic, so that a deduction of actual engine hour time cannot be made, a time allowance per car shall be agreed upon and deductions calculated accordingly. Whenever Milwaukee non-pooled traffic is handled in conjunction with North Western non-pooled traffic, and not in conjunction with pooled traffic, the cost of such work shall be determined as nearly as possible on an actual basis and billed against the Milwaukee. The Milwaukee shall bear its Pool Percentage of the Maintenance due to use of facilities, such as engine [fol. 399] houses, turn-tables, water and coal stations,

tracks, etc., used in servicing locomotives and assignable to the pooled ore traffic. Maintenance due to use shall be determined by the A. R. E. A. Formula, and the proportion of maintenance assignable to the pooled ore traffic shall be determined from time to time from the number of units serviced.

Pooled Tracks and Facilities on the Range:

26. A joint survey shall be made as soon as practicable to determine what trackage (exclusive of main line tracks) and facilities incident thereto, on the Range are necessary for the handling of pooled business, including mine service tracks, switching and yard tracks, engine terminals, repair tracks, assembly yards, and any other tracks and facilities necessary for the economical operation of the pooled service. The facilities so determined as necessary for the pooled business shall be pooled. All trackage not necessary for the economical operation of the pooled service shall be removed, both that exclusively owned and that jointly owned, governmental authority for such removal being obtained if and when required. Salvage therefrom and expense of removing shall be distributed according to ownership. Either party may retain for its exclusive use any existing tracks and facilities which it desires to retain and use for non-pooled traffic, and in the case of a jointly owned track or other facility, it will pay the other road that proportion of the salvage value of the material therein, which is equal to the other road's ownership therein.

27. There shall be no actual transfer by either party to the other of title to the trackage or facilities so pooled, but for the purposes of this agreement, each party hereby grants to the other party such rights and privileges of use of its said tracks and facilities, as may be necessary to effectuate such purposes. The use by either party of the pooled trackage and facilities, including the main line of the Milwaukee between Amasa and Crystal Falls, shall also be permitted in the handling of non-pooled traffic to and from territory now reached and served by tracks and facilities which either party shall have abandoned pursuant to this agreement. Either party shall have the right to build spur tracks from pooled tracks within the territory now reached and served by the tracks and facilities which it shall have abandoned pursuant to this agree-

ment, for serving industries other than ore mines; and the other party shall be privileged to join in such construction, or thereafter shall have the right, within a period of five years, to acquire one-half ownership therein upon payment of one-half of the cost thereof. Except to the extent herein otherwise provided, neither party shall have the right to have trackage retained in the pool which is not needed for the economical handling of the pooled traffic, either at the present or any future time.

Maintenance of Range Tracks and Facilities:

28. The expense of maintaining pooled tracks and other pooled facilities on the Range shall be borne by the North Western and the Milwaukee in accordance with the Pool Percentages. The expense of maintaining exclusive tracks and facilities shall be borne by the owner.

29. The total cost of pooled maintenance shall be credited with an allowance for the movement of non-pooled cars over the pooled tracks based upon the percentage of non-pooled cars to total cars moved over such tracks. Zones shall be established by agreement between the parties so as to fairly distribute such expense. This allowance, which shall be chargeable against non-pooled cars, shall be apportioned between the North Western and the Milwaukee in accordance with the percentage of non-pooled cars handled by or for each of them respectively, and be made in the form of an annual adjustment.

30. The work of maintaining the pooled tracks at Amasa and the pooled tracks of the Milwaukee at Iron Mountain shall be performed by the Milwaukee. The work of maintaining pooled tracks elsewhere on the Range shall be performed by the North Western.

Additions, Betterments and Retirements on the Range, and Property Adjustment Upon Termination of Contract:

31. The North Western and the Milwaukee shall each make such additions and betterments, extensions, rearrangements and retirements to the pooled tracks and facilities on the Range which it maintains as may by mutual agreement be found essential for the efficient and economical handling of the pooled business. The party making

such additions and betterments shall be reimbursed by the other to the extent of such other party's Pool Percent-
[fol. 400] age of the actual cost thereof. For simplicity in accounting and recording all minor extensions of tracks and facilities incident to rearrangement or adjustment of pooled tracks and facilities shall be owned by the party owning the tracks and facilities in connection with which the extensions are made; and the accounting, both installation and retirement, shall be recorded through Account 701 of the Road in whose accounts the investment for the original track or facility is carried. All new tracks, and major extensions to existing tracks such as those serving new mines or new industries and new facilities such as water tanks, section houses, etc., shall be treated as jointly owned, and the pool percentage of construction cost recorded in the Investment Account of each Road.

32. Subsequent to the adjustment and removal of trackage pursuant to Section 26 hereof, any pooled tracks which are no longer required shall be removed by the maintaining party. The cost of removal and the salvage recovered therefrom shall be divided upon the pool percentages.

33. Upon termination of this agreement the pooled tracks and facilities shall be disposed of as follows:

(a) Tracks which either party alone desires to retain may be acquired by reimbursing the other for the pool proportion of the net salvage value or if both parties wish to retain, shall be continued in joint and equal ownership.

(b) The net salvage from tracks which are abandoned shall be divided on the pool percentages.

Use and Maintenance of Tracks and Other Facilities Utilized in the Transportation of Pooled Traffic and Empty Cars and Equipment Therefor Between the Range and Escanaba, the North Western's Non-Pooled Traffic and Equipment Therefor Between Amasa and Crystal Falls, and the Milwaukee's Non-Pooled Traffic and Empty Equipment Therefor Between Escanaba and Iron Mountain:

34. The North Western agrees to handle the Milwaukee Company's portion of the pooled traffic and such non-pooled

traffic (hereinafter defined) as the Milwaukee is now privileged to handle over the Escanaba & Lake Superior Railroad and empty equipment therefor, over its main tracks, side tracks, other yards, and all other facilities required to be used in the transportation thereof, between the Range and appropriate originating and terminating facilities in or near Escanaba, without any specific rental therefor other than the share of the savings herein otherwise provided. The non-pooled traffic referred to above is to consist of: (a) Coal, commercial and company, from any coal dock in the Township of Wells or in or near the City of Escanaba, which the Milwaukee now owns or leases or which it may hereafter own or lease, and which can be connected up with North Western trackage by new tracks, trackage rights, or switching arrangements with other railroads; destined to any Milwaukee owned or operated trackage in or near Escanaba or the Township of Wells, or to any point on the Range now served by the Milwaukee, or to any point on or beyond Milwaukee lines; and (b), Company material for construction and maintenance of any facilities of the Milwaukee which may now or hereafter be located in the Township of Wells or in or near the City of Escanaba.

35. A joint survey shall be made as soon as practicable of the road trackage and facilities incidental thereto of each party needed and to be used for the movement of—

(a) Pooled ore,

(b) Pooled ore and non-pooled freight traffic,

(c) Pooled ore, non-pooled freight and passenger traffic,

(d) Exclusive non-pooled freight traffic and passenger traffic of the operating company.

The survey shall divide the section into zones so that as nearly as practicable the traffic characteristics shall be the same within the limits of each zone, and with the further objective that a division of maintenance based on a count of cars and locomotives will give the same result as a division based on car miles and locomotive miles. The maintenance expenses for each such class of trackage and facilities, by zones, exclusive of engine ter- [fol. 401] minal facilities, fuel stations, water stations and

equipment repair facilities shall be segregated in the records of the maintaining parties and the proportions thereof attributable to use as determined in accordance with the A. R. E. A. Formula shall be further divided and paid for by the parties hereto as follows:

Class (a). No further division; Each party will pay or bear its Pool Percentage.

Class (b). To be divided between pooled and non-pooled freight traffic on the basis of number of cars thereof; the portion assigned to pooled traffic will be paid for or borne on the Pool Percentages; the portion assigned to non-pooled freight traffic will be paid for or borne on the basis of each party's non-pooled cars thereof.

Class (c). To be divided between pooled and non-pooled freight traffic and passenger train traffic on the basis of cars and locomotives thereof—passenger train cars and locomotives to be multiplied by two account speed and low consist of passenger trains. The portion assigned to pooled and non-pooled freight service shall be further handled as provided for in Class (b). The portion assigned to passenger train service shall be borne by the party operating such trains.

Class (d). To be borne in total by the operating party.

Where rail is relaid with heavier rail, for the purpose of this contract, the cost of the additional weight shall be handled as if chargeable to operating expenses.

The maintenance expenses due to use of engine terminal facilities, fuel stations, water stations and equipment repair facilities, for the purposes of apportionment between the two companies, shall be handled as follows:

(a) Engine terminal facilities: Add to and distribute in Enginehouse Expenses as if chargeable to Accounts 388 (Yard) and 400 (Road).

(b) Fuel Stations: Include in the charge-out price of coal as if chargeable to Accounts 382 (Yard) and 394 (Road).

(c) Water Stations: Include in the charge-out price of water as if chargeable to Accounts 385 (Yard) and 397 (Road).

(d) Equipment Repair Facilities: Add to and distribute in locomotive and car repairs as if chargeable to Accounts 308 and 314.

36. The Milwaukee agrees to handle the North Western's portion of the pooled traffic from the Amasa District over its main tracks, yards, side tracks and all other facilities required to be used in the transportation of pooled traffic and empty equipment therefor between Amasa and Iron Mountain and the North Western's non-pooled traffic and empty equipment therefor to or from Amasa and Balsam and between said points Amasa or Balsam and Crystal Falls or Iron Mountain as agreed upon from time to time without any specific rental therefor other than the share of the savings herein elsewhere provided. The facilities used for the handling of pooled or non-pooled traffic and the division of maintenance expenses attributable to use shall be determined and divided as between passenger, pooled freight and non-pooled freight, on the same basis as prescribed in paragraph 35.

Switching on the Range:

37. The switching of the pooled ore business at Amasa and elsewhere on the Range shall be pooled. The Milwaukee shall furnish power and crews for and shall perform all such switching throughout each ore shipping season at the mines at Amasa. The North Western shall furnish crews for and shall perform all such switching throughout each ore shipping season for the service of mines elsewhere on the Range. The total expenses of all such switch-
[fol. 402] ing the principal accounts being—378, Yard conductors and brakemen; 380, Yard Enginemen; 382, Fuel for yard locomotives; 387, Other supplies for yard locomotives; 388, Enginehouse expenses-Yard shall be divided between the parties on the basis of Pool Percentages. Whenever crews assigned to the handling of pooled traffic are used for non-pooled traffic, a proper deduction shall be made for the engine hours devoted to non-pooled traffic. The party for whom such non-pooled traffic switching is performed shall bear the total cost thereof. If non-pooled traffic is handled in conjunction with pooled traffic, so that a deduction of actual engine hour time cannot be made, a time allowance per car shall be agreed upon and deductions calculated accordingly. Whenever the non-pooled

traffic of one road is handled in conjunction with the non-pooled traffic of the other road, the cost of such work shall be determined as nearly as practicable on an actual basis and billed accordingly. Each party, as prescribed in Paragraph 35, shall bear its Pool Percentage of the maintenance of enginehouses, turn-tables, water and coal stations and other facilities used in servicing the switching locomotives.

Road Haul:

38. The Milwaukee shall furnish train and engine men and perform the road haul of pooled ore and North Western non-pooled business between the Amasa District and Iron Mountain and Crystal Falls. The North Western shall furnish train and engine men and perform the road haul of pooled ore and Milwaukee non-pooled business between the remainder of the Range points and Escanaba, including Amasa ore from Iron Mountain.

39. Expenses incurred exclusively in the performance of road haul of pooled traffic shall be borne by the parties on the basis of Pool Percentages. Expenses the principal accounts being 392, Train Enginemen; 394, Fuel for train locomotives; 397, Water for train locomotives; 398, Lubricant for train locomotives; 399, Other supplies for train locomotives, 400, Enginehouse expenses-Train; 401, Trainmen; and 402, Train supplies and expenses, incurred in the performance of road haul of trains handling pooled traffic or pooled and non-pooled traffic of either or both companies, or non-pooled traffic of both companies, shall be divided on the basis of the car miles of pooled and non-pooled traffic in such trains. The portion of such expenses thus attributed to pooled traffic shall be divided between the parties on the basis of the Pool Percentages. The portions of such expenses thus attributed to non-pooled traffic shall be divided between the parties on the basis of the percentage the car miles of each is of the total car miles of non-pooled traffic. Transportation expenses that are not directly associated with train service, the principal accounts being 371 Superintendence, 372 Dispatching Trains, 404 Signal and Interlocker Operation, 405 Crossing Protection, 406 Drawbridge Operation, 407 Telegraph and Telephone Operation, 410 Stationery and Printing, 411 Other Expenses, 415 Clearing Wrecks, 416 Damage to Property, 417

Damage to Livestock on right-of-way, 420 Injuries to Persons, shall be divided between the pooled and non-pooled traffic on the basis of train miles of pooled and non-pooled traffic, including passenger service; in the entire pool territory. Where trains carry pooled and non-pooled traffic, the train miles shall be divided between pooled and non-pooled traffic on the basis of the car miles of each. The portion of such expenses thus attributed to pooled traffic shall be borne by the parties on the basis of the Pool Percentages. The portion of such expenses thus attributed to non-pooled traffic shall be borne by the parties on the basis of the percentage the freight car miles of each is of the total car miles of non-pooled freight traffic in the entire pool territory.

Motive Power and Cabooses for Handling Pooled Traffic:

40. The North Western and the Milwaukee shall each furnish and have the right to furnish its Pool Percentage of suitable motive power and cabooses required to handle the pooled tonnage throughout each ore season. The motive power requirement for switching shall be measured in terms of engine hours of tractive power worked. The motive power requirement for road haul service shall be measured in terms of locomotive ton miles. It shall be the duty of the North Western to use Milwaukee equipment furnished to the pool as intensively as its own equipment.

41. Each party shall bear the cost of maintaining the motive power and cabooses it supplies, except that if at the end of any ore season either party shall have supplied more than its Pool Percentage it shall be entitled to be reimbursed for the maintenance thereof to the extent that its contribution exceeds its Pool Percentage of the total required. The party supplying the excess power and cabooses shall be entitled to a fair rental for such extra contribution to cover interest on investment, depreciation and maintenance, provided, however, that deficiencies arising through inability to anticipate the quotas of each party in advance, or deficiencies arising out of failure of the North Western as the operating company to notify the Milwaukee of any part of its quota requirement, may be made up in the following year. In the performance of maintenance work, all classified repairs shall be made by the party own-

[fol. 403]

ing the power. Necessary running repairs shall be made by the North Western on all power and cabooses except that employed in handling the ore from the Amasa District to Iron Mountain. The cost thereof shall be borne by the owner.

42. In determining the motive power requirement performed by locomotives of either party in road haul service used in the movement of pooled traffic in trains also handling other traffic of the owner, the locomotive ton miles made while the locomotive was handling pooled traffic shall be such proportion of the total locomotive ton miles as the gross ton miles made by ore cars, empty or loaded with ore, and the gross ton miles made by cars moving non-pooled traffic of the other party bears to the total gross ton miles made by all cars handled by such locomotives during such period.

Counting Cars for Computing Car Miles for Distribution of Expense:

43. In counting cars, no distinction shall be made between the various kinds of cars, loaded or empty, except that passenger cars and passenger locomotives shall be counted as two cars each. Locomotives other than passenger locomotives shall not be counted. All empty ore car movements between points on the Range or between Escanaba and points on the Range shall be attributable to pooled traffic. All empty car movements over the tracks of the North Western known to be for handling Milwaukee's non-pooled traffic shall be attributable to its non-pooled traffic. All other empty car movements over the tracks of the North Western shall be attributed to the North Western's non-pooled traffic. All empty car movements over the tracks of the Milwaukee known to be for North Western's non-pooled traffic shall be attributable to its non-pooled traffic. All other empty car movements over the tracks of the Milwaukee shall be attributable to the Milwaukee's non-pooled traffic. Movements of work cars or other non-revenue equipment over the lines of either of the parties shall not be counted. Company material for use outside of the pool district of the owning company shall be considered as non-pooled traffic and the cars counted in the same manner as elsewhere provided for revenue non-pooled traffic.

Pooling of Ore Cars:

44. All cars for the handling of pooled ore shall be pooled when so required. The North Western and the Milwaukee shall each furnish and have the right to furnish its Pool Percentage of the car capacity required to handle such tonnage throughout each ore season. If either of them shall be unable to furnish its proportion of the necessary ore cars it may lease from the other, if cars are available, at A. R. A. rates, sufficient number of such cars to make up the deficiency.

45. To the extent found necessary, pooled cars shall be marked as such and handled accordingly. When cars are taken out of pooled service for general repairs or other service, they shall be forthwith replaced by cars of equal capacity similarly identified. Pooled cars shall not be moved outside of the pooled territory without substitution of equivalent capacity. Pooled ore cars will be used by either party in other service only to the extent that such use will not interfere with the pooled service. Whenever such use does interfere, the party using such cars in other service shall forthwith provide an equivalent capacity of additional cars for the pooled service.

Maintenance of Pooled Cars:

46. The North Western and the Milwaukee shall each maintain its own cars at its own expense, except as herein otherwise provided. Cars leased by one party to the other shall be maintained by the lessee company to the extent provided by A. R. A. rules.

47. The party in possession of pooled cars will provide inspection and furnish supervision and labor required in making minor repairs, generally referred to as "Transportation Yard Repairs" and "Lubricating Cars", and like service. The expense of such inspection, supervision and labor shall be divided on Pool Percentages. An equitable proportion of the cost of supplies and tools used by such forces shall be assigned to the expense of pooled cars and borne by the parties on the basis of the Pool Percentages.

[fol. 404] 48. The cost of materials used in making Transportation Yard Repairs shall be borne by the car owner or lessee.

49. The total cost of other running repairs, including both labor and materials, shall be borne by the car owner whether made by the owner or not.

50. The cost of repairs to pooled cars damaged as a result of non-pooled operations shall be borne by the party responsible for such damage.

Rental Based on Savings from Abandoned Operations:

51. The Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad and shall discontinue and abandon its yards and other facilities at Escanaba, except its coal dock and tracks appurtenant thereto. The North Western shall subject to the approval of the Interstate Commerce Commission, discontinue and abandon its Amasa line. It is agreed that during the ten years ending with 1932, these roads incurred average annual expenditures as follows which will hereafter be saved:

Milwaukee:

I Operations over the Escanaba & Lake Superior R. R.:

	Fixed Independent of Volume of Ore	Varying With Volume of Ore
(a) Maintenance of way and structures not due to use determined in accordance with A. R. E. A. Formula	$	$41,950.00
(b) General Expenses		4,682.00
(c) Taxes		15,019.00
(d) Rental		15,194.00
Total		$76,845.00

II Operating Escanaba Yard:

Maintenance of way and structures not due to use determined in accordance with A. R. E. A. Formula	$2,625.00

North Western:

III Operating Amasa Line:

Maintenance of way and structures not due to use determined in accordance with A. R. E. A. Formula	$2,681.00

Savings of salvage and taxes are omitted in II and III, as they approximately offset each other.

The Milwaukee shall pay annually to the North Western in equal monthly installments, one-half of the fixed expenses under II, and the North Western shall similarly pay to the Milwaukee, one-half of the fixed expenses under III. The Milwaukee shall also pay to the North Western for each ton of its proportion of the pooled ore handled 2.762 cents per ton, which amount is one-half of the average annual expense varying with the volume of tonnage of $76,845 divided by the average annual tonnage of the Milwaukee over the ten-year period of 1,391,443 tons.

Under the provisions of the contract between the Milwaukee and Escanaba and Lake Superior Railroad, the Milwaukee is required to pay a fixed minimum annual rental of $27,180, and, in addition, approximately $1,234 for amortization of past additions and betterments. Should the [fol. 405] Milwaukee discontinue the use of the line of the Escanaba and Lake Superior Railroad, it is obligated under the provisions of the contract to continue these payments so long as the Escanaba and Lake Superior Railroad maintains its line between Channing and Escanaba, or until the expiration of the contract between the two companies on January 1, 1951. From the date the Milwaukee is relieved of making these payments, or any part thereof, it shall pay annually to the North Western one-half the amount or amounts by which it is relieved of minimum rental payment during the life of this agreement and one-half of the amount or amounts by which it is relieved of payments for amortization of past additions and betterments until January 1, 1951.

Traffic Interchanged With the Escanaba and Lake Superior Railroad:

52. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is, therefore, agreed that from the effective date of this contract the revenues of

the two companies from all business interchanged with the Escanaba and Lake Superior shall be pooled on the following basis:

A study of the six year period, 1927 to 1932, both inclusive, shall be made and the total revenue accruing to each company on business interchanged by the Milwaukee and the North Western with the Escanaba and Lake Superior Railroad determined. From the total amount interchanged by the Milwaukee with the Escanaba and Lake Superior Railroad shall be deducted an amount equal to ten per cent. The relation between the remainder and the total of such remainder plus the revenue of the North Western shall then be determined. Thereafter, the total revenues derived by each company from business interchanged with the Escanaba and Lake Superior Railroad, less an amount of thirty per cent of such gross revenues to cover cost of handling by either company, shall be put into a pool and divided on the basis of the percentages established for the six year period.

53. Should the North Western subsequent to the date this contract is entered into acquire the trackage of the Escanaba and Lake Superior Railroad, it will continue to pay the Milwaukee a net figure equal to the Milwaukee's division during the period the contract has been in effect.

54. In case the North Western should acquire the terminals of the Escanaba and Lake Superior Railroad by other than voluntary action on its part at any future date, then the question as to how much the North Western should pay to the Milwaukee on account of divisions arising out of interchange business shall be determined by arbitration in the manner hereinafter provided.

55. The North Western agrees to join with the Milwaukee in establishing appropriate through rates and divisions for handling interline traffice via Iron Mountain so as to permit the Milwaukee to continue handling business to and from industries served by the Escanaba and Lake Superior Railroad, either direct or through reciprocal switching arrangements with the North Western. All such traffic interchanged at Iron Mountain shall be included in the foregoing pool the same as traffic interchanged at Channing.

Presentation and Settlement of Bills:

56. Except as herein otherwise provided, bills shall be rendered monthly and payable within thirty days after presentation.

Collections for Pooled Operations:

57. Settlement for revenue shall be through the current monthly settlement of revenue collected for interline freight traffic.

Examination of Accounts:

58. Each party shall have the privilege of examining the books and accounts of the other involved in this arrangement, but payment of bills shall not be withheld pending such examination.

[fol. 406] Existing Agreements Superseded:

59. Any provisions of existing agreements between the parties hereto covering ownership, maintenance, use or operation of any of the tracks, facilities or services hereunder pooled which are inconsistent with any of the provisions of this agreement shall be superseded by the provisions of this agreement from and after the effective date hereof; provided, however, that any of the rights, privileges or obligations of either of the parties accrued prior thereto shall not be affected.

Annual Adjustments:

60. Any deficiency in tonnage, engine hours, or other pooled expense, remaining at the end of a season or year, shall be carried forward to the subsequent year's operations and adjusted as early as possible in such subsequent year.

Materials Used In Construction and Maintenance of Tracks and Facilities:

61. The North Western and the Milwaukee each reserves the right to (a) furnish all materials required for both maintenance of and addition and betterment work to its solely owned non-pooled tracks, and (b) furnish in so far as is practical its proportion, at Pool Percentages, of any and all materials, small tools and equipment required in connection with both maintenance of, and addition and betterments

work to, pooled trackage and facilities. Materials furnished by each party shall be of equal grade and quality, and each shall be given credit in bills rendered for the purchase price of same, plus foreign line transportation charges.

62. All track changes, including new tracks and connections, necessary at the outset for the ore pooling and the handling by one company for the other of its non-pool traffic, shall be built by the party most conveniently situated to perform the work and the cost shall be divided equally.

General Overhead and Other Indirect Expenses:

63. For all work of constructing new ore docks, or complete rebuilding of the superstructure, or section thereof, or for extending present docks, and for all addition and betterment work, cost shall be the expenditures recorded in the books of the constructing company (excluding interest during construction) in accordance with the classification of Investment in Road and Equipment of Steam Roads prescribed by the Interstate Commerce Commission in effect at the time such expenditures are made, plus two and one-half per cent (2½%) of the total expenditures recorded, except that to payments to contractors one per cent (1%) only shall be added.

64. For heavy renewals of ore docks, generally performed between ore shipping seasons, the cost for the purpose of this agreement shall be determined in accordance with the classification of Investment in Road and Equipment of Steam Roads prescribed by the Interstate Commerce Commission (excluding interest during construction) in the same manner that they would be determined if the expenditures were chargeable to Investment Accounts in accordance with the above mentioned classification. To the total expenditures so determined, two and one-half per cent (2½%) shall be added, except that to contractors' bills one per cent (1%) only shall be added.

65. With the exception of the expenditures provided for in paragraphs 63 and 64, the classifications of the Interstate Commerce Commission in effect at the time any expenditures are made shall be followed in determining whether such expenditures are a part of the cost of construction or making additions and betterments to said ore handling fa-

cilities, tracks, etc., and therefore chargeable to Capital Account, or whether such expenditures are a part of the cost of operating, maintaining, repairing and renewing said ore handling facilities, tracks, etc., and are chargeable to operating expense accounts.

66. With the exception of the expenditures provided for in paragraphs 63 and 64, it is understood and agreed that cost of operating, maintaining, repairing and renewing said ore handling facilities, tracks, etc., shall be the expenditures recorded in the books of the maintaining and operating company, in accordance with the classification of Operating Revenues and Operating Expenses of Steam Roads prescribed by the Interstate Commerce Commission, together with a fair amount to cover rental and transportation of [fol. 407] equipment. To the recorded expenditures for material and supplies except locomotive coal there shall be added fifteen per cent (15%) to cover store expense, accounting, and transportation on the maintaining and operating company's line.

67. The rental rates charged for steam wrecker or other similar equipment used in emergency in ore operation shall be those used in the accounts of the company furnishing same for similar equipment when used for Addition and Betterment work.

68. Contributions paid by either party under the provisions of the Railroad Retirement Act, or any similar legislative Act, shall be considered as a part of the cost of labor and distributed in the same manner as wages.

Liability Clauses:

69. All liability and expense on account of injuries to and deaths of employes of the parties hereto and of third persons, and all loss of and damage to the property thereof, arising in any manner out of the maintenance of the docks at Escanaba, shall be assumed, apportioned between and borne by the parties hereto according to their respective dock percentages provided for in paragraph 12 hereof; and when such liability and expense arise, in any manner out of the operation of said docks, they shall be assumed, apportioned between and borne by the parties hereto on the basis of the division of operating expenses provided for in paragraph 21 hereof.

70. All liability and expense on account of injuries to and deaths of employes of the parties hereto and of third persons, and all loss of and damage to the property thereof, arising in any manner out of the maintenance or operation of the ore dock yard and switching at Escanaba shall be assumed and apportioned between and borne by the parties hereto in the same manner as the other maintenance and operation costs, respectively, of said ore dock yard and switching at Escanaba, under the provisions of Paragraphs 22, 23, 24 and 25 hereof.

71. All liability and expense on account of injuries to and deaths of employes of the parties hereto and of third persons, and all loss of and damage to the property thereof, arising in any manner out of the construction, addition, betterment, extension, rearrangement, retirement, maintenance and operation of the pooled tracks and facilities on the Range, and switching on the Range shall be assumed, apportioned between and borne by the parties hereto in the same manner as the other costs of such work with respect to said pooled tracks and facilities on the Range and switching on the Range under the provisions of paragraphs 28 to 32, both inclusive, and paragraph 37 hereof.

72. All liability and expense on account of injuries to and deaths of employes of the parties hereto and of third persons, and loss of and damage to the property thereof, arising in any manner out of the maintenance of the road trackage and facilities utilized in the transportation of pooled traffic and empty cars and equipment between the Range and Escanaba, shall be assumed, apportioned between and borne by the parties in the same manner as other maintenace costs under the provisions of paragraphs 35 and 36 hereof.

73. All liability and expense on account of injury to and deaths of employes of the parties hereto and of third persons, and loss of and damage to the property thereof, arising in any manner out of the operation of the road trackage and facilities in the transportation of pooled traffic and empty cars and equipment between the Range and Escanaba shall be assumed, apportioned between and borne by the parties as follows:

(a) When such liability and expense result from the operation of a train, engine or car, for the purpose of hand-

ling exclusively, traffic of one of the parties hereto, it shall be borne solely by that party.

(b) When such liability and expense result from the operation of a train, engine or car for the purpose of handling exclusively pooled ore, they shall be assumed, apportioned between and borne by the parties on the basis of the pool percentages.

(c) When such liability and expense result from the operation of a train, engine or car, for the purpose of handling both pooled and nonpooled traffic, they shall be assumed, apportioned between and borne by the parties on the basis set forth for the division of other operating expenses in paragraph 39 hereof.

[fol. 408] 74. In case of collision on any of the trackage covered by this agreement between engines, cars or trains, while being used exclusively in the service of the North Western and the Milwaukee, respectively, the party whose sole employes are alone at fault shall be solely responsible for and shall assume and bear all liability and expense on account of injuries to and deaths of persons and loss of and damage to property resulting from such collision, and if such collision is caused by the fault of the sole employes of both parties, each party shall assume and bear all such liability and expense with respect to its own property and property in its custody and its passengers and employes and an equal share of all other liability and expense resulting from such collision.

In case of collision on any of the trackage covered by this agreement between the engines, cars or trains of the North Western and Milwaukee, respectively, while being used exclusively in the handling of pooled ore, all liability and expense on account of injuries to and deaths of persons and loss of or damage to property resulting from such collision shall be borne by the parties hereto on the Pool Percentage.

In case of collision on any of the trackage covered by this agreement between engines, cars or trains while being used in handling both pooled and non-pooled traffic of the North Western and Milwaukee, respectively, all liability and expense on account of injuries to and deaths of persons and loss of and damage to property resulting from such collision shall be assumed, apportioned between and borne

by the parties on the basis set forth for the division of other operating expenses in paragraph 39 hereof.

Defense of Suits; Settlements:

75. In case of suit against either party, where the party so sued gives to the other party reasonable notice, in writing, of the pendency of such suit, the party notified shall be concluded by the judgment as to the amount of damages recovered and as to any matters that might have been therein litigated.

76. The parties will settle, as between themselves, any claim for death, injury or damage to persons or property according to the terms of this agreement, notwithstanding any judgment or decree of any court or other tribunal in a proceeding brought by third parties.

Delays:

77. Neither party, under any circumstances, shall have any cause of action against the other for loss or damage of any kind caused by or resulting from interruption or delay to its business.

Arbitration provisions:

78. Should the North Western and the Milwaukee disagree upon any question as to the true construction of any provision in this contract or concerning any violation of any such provision, such question shall be submitted to the arbitrament of three (3) disinterested persons experienced in railway management. The party demanding such arbitration shall give to the other party written notice of such demand, stating specifically the question to be submitted for decision and nominating a person who has the required qualifications to act as one arbitrator. If at the expiration of thirty (30) days from the receipt of such notice the party receiving it has not notified in writing the party demanding the arbitration of its nomination of a second arbitrator having like qualifications, the party demanding such arbitration may apply, after ten (10) days' written notice to the other party, to any judge of the United States Circuit Court of Appeals, Seventh Circuit, for the appointment of a second arbitrator. Should the party to whom notice of arbitration is given not have appointed

such arbitrator before the expiration of said ten-day period, at any time thereafter such second arbitrator shall be appointed by such judge, and shall thereupon be deemed an arbitrator within this section as if appointed by the party to whom such notice was given. The two arbitrators so appointed as aforesaid shall select a third arbitrator, and the three arbitrators so appointed shall constitute a Board of Arbitrators. In the event of the two arbitrators being unable to agree, within ten (10) days after appointment of such second arbitrator, on such third arbitrator, after five (5) days' written notice by either party to the other any judge of said court may appoint such third arbitrator, and when so appointed, such three arbitrators shall constitute the Board as aforesaid.

[fol. 409] The third arbitrator shall have the power to fix the time and place when and at which the arbitration shall proceed, but, in doing so, shall give due consideration to the reasonable convenience of the parties and their witnesses.

Upon such Board of Arbitration being completed, it shall proceed with reasonable diligence to inquire into the questions at issue as disclosed in such notice, and may take such evidence as it may deem reasonable or as either party may submit, without requiring witnesses to be sworn, and may hear argument of counsel or others. After the parties have been heard, it shall proceed to make its award in writing, and the same, when signed by two or more of the arbitrators, shall be final, binding and conclusive upon the parties, subject to the approval of the Interstate Commerce Commission if required by law.

Immediately after any award, so approved by the Interstate Commerce Commission if required by law, the North Western and the Milwaukee each shall make such changes in the conduct of its business, or such payments or restitution, as the case may be, as are in and by such award required to be made.

The books and papers of both or all the parties, so far as they relate to any matter submitted to arbitration, shall be open to the examination of the arbitrators.

The North Western and the Milwaukee each shall pay an equal proportion of the fees and expenses thereof and all fees and expenses of its own witnesses and counsel. Until the arbitrators shall make their award upon any question

submitted to them, the business to be done and the settlements and payments to be made under the terms of this agreement shall continue to be done and made in the manner and form existing prior to the arising of such question.

If the North Western or the Milwaukee shall refuse to perform any award, so approved by the Interstate Commerce Commission if required by law, the adverse party may enforce the same by apt proceedings in any court of law or equity.

Contract Not Assignable:

79. Except as herein otherwise provided, neither the North Western nor the Milwaukee shall assign, or in any manner transfer this agreement, or any right or privilege under and by it granted, nor permit any person or persons, company or companies, to share in any such right or privilege. This agreement shall attach to and run with the railways of the North Western and the Milwaukee, respectively, during the term hereof and shall inure to the benefit of and be binding upon their successors and assigns respectively and either the North Western or the Milwaukee, in connection with and as a part of its railway line, may sell, assign, lease or mortgage the rights herein granted it.

Default:

80. Should either the North Western or the Milwaukee fail to make any payment when due which it is obliged by this agreement to make, or fail in any other respect to perform the obligations on its part to be performed under this agreement, and should such default continue for three months after notice, in writing, to the defaulting party by the other party of an intention to terminate the agreement, said other party at its election may declare this agreement terminated and exclude the defaulting party from all use of the joint trackage and facilities save that owned by the defaulting party exclusively or in common with the other party. Provided, that failure to make any payment which is the subject of arbitration or litigation between the parties shall not be deemed, pending such arbitration or litigation cause for forfeiture hereunder. Either party may waive such default, but no waiver shall affect any subsequent default.

Notices:

81. All notices required to be given by either party to the other may be given by serving the same in writing upon its president, vice president or secretary for the time being.

[fol. 410] Term of Agreement:

82. This agreement shall be effective as soon as practicable following the date of approval by the Interstate Commerce Commission, and shall continue for a period of ninety-nine (99) years from the succeeding December 31st, provided, however, that the Milwaukee shall have the right, upon permanent withdrawal from the ore business on the Menomine Range to terminate the agreement at the end of any calendar year by giving one year's written notice in advance to the North Western of such intention to withdraw; provided, however, that such termination shall not relieve the Milwaukee from its obligation to reimburse the North Western for the prescribed percentage of the North Western's investment in docks as provided for in paragraphs 17 and 18 hereof, nor relieve it from any obligations which shall have accrued under this agreement prior to the effective date of termination hereof.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers thereunto duly authorized on the day and year first above written.

Chicago and North Western Railway Company, by Fred W. Sargent, President.

Attest: Barret Conway, Secretary. (Seal.)

Escanaba, Iron Mountain and Western Railway Company, by Fred W. Sargent, President.

Attest: Barret Conway, Secretary. (Seal.)

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, by H. A. Scandrett, President.

Attest: A. C. Hagensick, Assistant Secretary. (Seal.)

[fol. 411] State of Illinois,
County of Cook, ss:

I, Frank H. Holzfeind, a Notary Public in and for the above mentioned County and State, do hereby certify

that the above named Fred W. Sargent and Barret Conway, to me personally known as the President, and Vice President and Secretary, respectively, of Chicago and North Western Railway Company, a corporation, appeared before me this day in person and acknowledged their signing, sealing and delivering the foregoing instrument as the free and voluntary act of said corporation, for the consideration and purposes therein set forth, and that they are duly authorized to execute the same by the Board of Directors of said corporation.

In Witness Whereof, I have set my hand and seal hereto this 13th day of April, A. D., 1935.

Frank H. Holzfeind, Notary Public. My Commission Expires March 27, 1937.

STATE OF ILLINOIS,
County of Cook, ss:

I, Frank H. Holzfeind, a Notary Public in and for the above mentioned County and State, do hereby certify that the above named Fred W. Sargent and Barret Conway, to me personally known as the President, and Vice President and Secretary, respectively, of Escanaba, Iron Mountain and Western Railroad Company, a corporation, appeared before me this day in person and acknowledged their signing, sealing and delivering the foregoing instrument as the free and voluntary act of said corporation, for the consideration and purposes therein set forth, and that they are duly authorized to execute the same by the Board of Directors of said corporation.

In Witness Whereof, I have set my hand and seal hereto this 13th day of April, A. D., 1935.

Frank H. Holzfeind, Notary Public. My Commission Expires March 27, 1937.

STATE OF ILLINOIS,
County of Cook, ss:

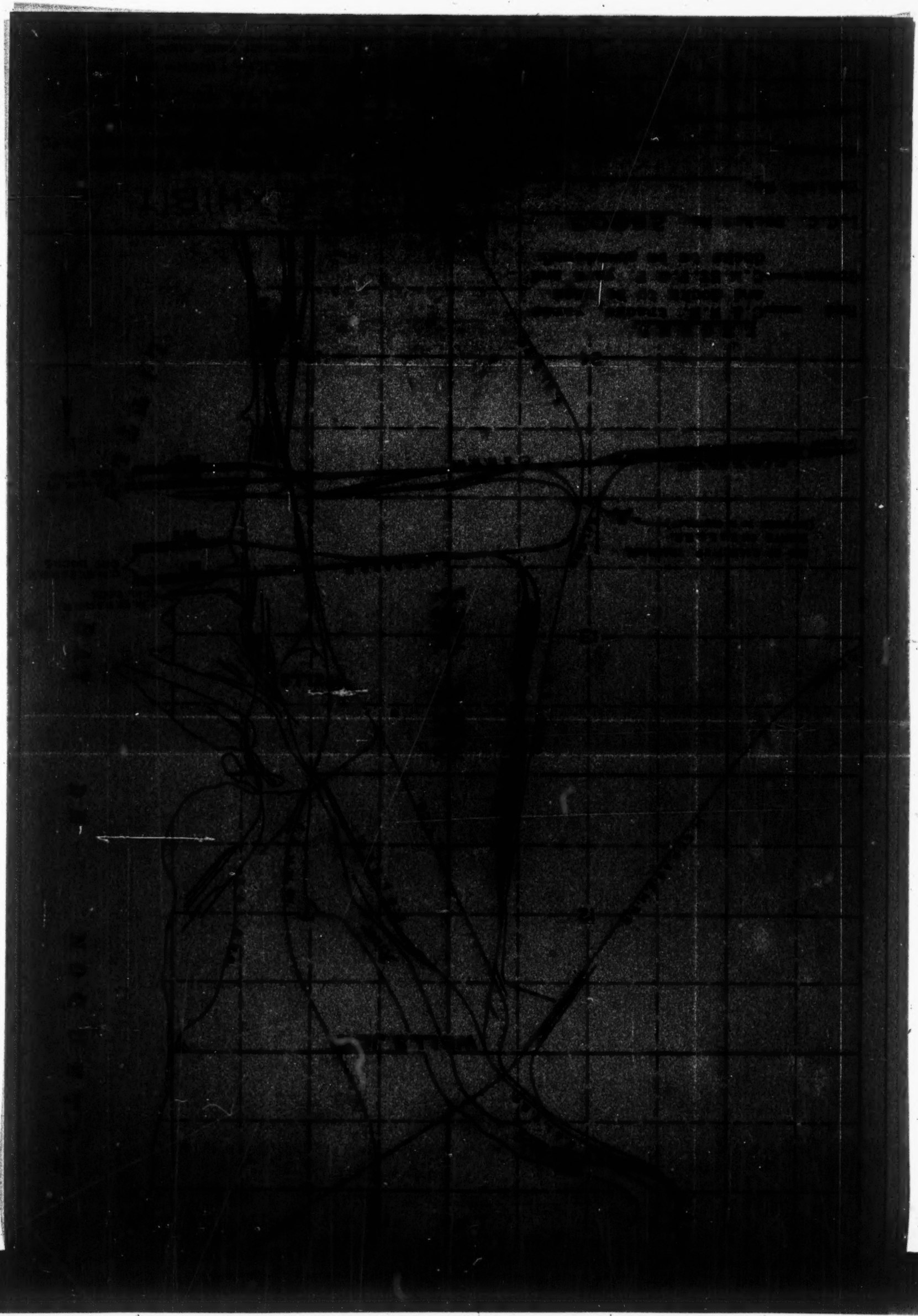
I, C. L. Lane, a Notary Public in and for the above mentioned County and State, do hereby certify that the above named H. A. Scandrett and A. C. Hagensick, to me personally known as the President and Assistant Secretary, respectively, of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, appeared before me this day in person and acknowledged their signing, sealing and de-

livering the foregoing instrument as the free and voluntary act of said corporation, for the consideration and purposes therein set forth, and that they are duly authorized to execute the same by the Board of Directors of said corporation.

In Witness Whereof, I have set my hand and seal hereto this 16th day of April, A. D., 1935.

C. L. Laue, Notary Public. My Commission Expires Nov. 2nd, 1937.

(Here follow 2 maps, side folios 412 and 413.)



[fols. 414–415]

EXHIBIT No. 5

C. M. St. P. & P. R. R. and C. & N. W. Ry.

Iron Ore: From Menominee Range and as Handled Over Escanaba Docks—Gross Tons Year 1923–1932 Inclusive

Years	Menominee Range				Handled over Escanaba Docks			
	C. M. St. P. & P. (C. M. St. & P. Record)		C. & N. W. (C. & N. W. Record)	Total Menominee Range (Railroad Record) Tons	C. M. St. P. & P. (C. M. St. P. & P. Record)		C. & N. W.* (C. & N. W. Record)	Total Escanaba Docks* (Railroad Record) Tons
	Tons	% of Total Menominee Range	Tons		Tons	% of Total Escanaba Docks	Tons	
1923	1,813,888	37.8%	2,984,622	4,798,510	1,813,888	32.3%	3,796,813	5,610,701
1924	1,291,135	33.8	2,534,418	3,825,553	1,291,135	30.4	2,952,549	4,243,684
1925	1,978,536	38.1	3,215,877	5,194,413	1,978,536	35.0	3,672,435	5,650,971
1926	1,965,602	33.5	3,898,641	5,864,243	1,965,602	29.8	4,626,728	6,592,330
1927	1,562,771	30.0	3,637,948	5,200,719	1,562,771	26.6	4,303,687	5,866,458
1928	1,602,094	33.1	3,235,383	4,837,477	1,602,094	29.2	3,884,698	5,486,792
1929	1,902,334	33.7	3,741,122	5,643,456	1,902,334	30.0	4,445,776	6,348,110
1930	1,173,682	32.5	2,434,157	3,607,839	1,173,682	28.6	2,923,130	4,096,812
1931	499,081	34.0	969,981	1,469,062	499,081	31.0	1,109,183	1,608,264
1932	125,307	40.8	182,107	307,414	125,307	38.0	204,343	329,650
Avg. 10 Yrs. 1923–32 Incl.	1,391,443	34.0	2,683,426	4,074,869	1,391,443	30.2	3,191,934	4,583,377

* Includes tonnage from Marquette Range handled by C. & N. W. over Escanaba Docks.

[fol. 416] EXHIBIT No. 6

North Western-Milwaukee Pooling of Menominee Range Ore

Estimated Annual Savings

A. Account discontinuance of use of certain properties and common use of other properties:

1. In connection with Ore Docks: Milwaukee to use North Western Docks:

(a) For next several years before any new docks are required:

Assuming, if pooling not effected, Milwaukee would build new dock costing $1,000,000: The annual cost of owning and maintaining such a dock is taken as the savings:

Interest at 4%	$40,000
Depreciation—S. F. 4%, 25 Year, 10% Salvage	22,000
Maintenance—Average	25,000
Taxes	16,000
Fire Insurance and Protection	7,000
	$110,000

(b) For all years after new joint concrete-steel dock is built at a cost of $2,500,000: Present dock No. 6 also to be used for at least 15 years.

Assuming, if pooling is not effected, Milwaukee and North Western would each build new separate timber docks costing respectively $1,000,000 and $1,500,000.

Comparative Annual Costs to Own and Maintain Docks

Items	Separate Operation			Joint Oper'n.
	C. M. St. P. & P.	C. & N. W.	Both	
New Docks only:				
Interest at 4%	$40,000	$60,000	$100,000	$100,000
Depreciation, 4% SF:				
25 Yr., 10% Salvage	22,000	32,000	54,000	
50 Yr., 10% Salvage	.....	.....	.....	15,000
Incl. C. & N. W.—No. 6:				
Maintenance	25,000	70,000	95,000	40,000
Taxes	16,000	36,000	52,000	48,000
Fire Ins. and Protection	7,000	14,000	21,000	10,000
Total Separate Opern	$110,000	$212,000	$322,000	
Total Joint Operation	.....	.....	.....	$213,000
Saving by Joint Operation	.....	.....	.....	..... $109,000

[fol. 417] 2. In connection with Yards at Escanaba:

Account abandonment of Milwaukee Yard. (12.5 miles of track)		
Maintenance not due to use	$2,625	
Interest on net value of salvage—including land: 4% on $15,000	600	
Taxes	1,000	
Total		$4,225

3. In connection with lines between Range and Docks:

(a) Account Milwaukee discontinuing use of E. & L. S. R. R.:		
Maintenance of Way & Structures not due to use	$41,950	
Rental (over $27,000)	15,194	
Taxes	15,019	
General Expenses	4,682	
Total		76,845

(b) Account North Western abandonment of its Crystal Falls-Amasa Branch Line: (16.0 miles of track):		
Maintenance of Way & Structures not due to use	$2,681	
Interest on net value of salvage —4% on $15,000	600	
Taxes	1,000	
Total		4,281

[fol. 418] 4. In connection with tracks and yards on the Range:

Account abandonment of duplicating tracks (20 miles of track):		
Maintenance of Way & Structures not due to use	$5,000	
Interest on Net Value of Salvage—4% on $20,000	800	
Taxes	200	
Total		$6,000

5. Total Annual Savings in connection with fixed property $200,351

B: Account handling all ore in one channel and under one operator:

Savings to be obtained by quantity handling under one operation, such as the handling of ore over or through the docks; switching on the range, at intermediate points and at the docks; train service, particularly at the beginning and end of each ore season; and reduction in equipment required, particularly ore cars account elimination of duplicating standby requirements under separate operations; have been but roughly estimated as it is difficult to estimate these features in advance of actual experience. It is believed however that these savings will, for the average tonnage of ten year period, equal if not exceed the savings shown above account of Fixed Property.

(Here follows one paster, side folio 419.)

[fol. 419]

EXHIBIT No. 7

Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Comparative Income Account for the Years Ended December 31, 1929 to 1934 Inclusive

Items	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934
Railway Operating Revenues:						
Freight	$137,176,431	$115,638,093	$91,392,070	$70,302,779	$71,571,456	$73,382,543
Passenger	16,753,297	12,681,684	8,952,421	5,947,700	5,699,841	5,616,950
Mail	3,845,985	3,518,901	3,313,608	3,082,960	2,916,554	2,953,659
Express	4,573,529	3,355,178	2,440,255	1,638,393	1,297,996	1,554,438
All Other Transportation	6,027,697	4,875,547	3,573,265	2,718,856	2,783,979	3,000,201
Incidental	2,377,511	1,882,938	1,296,347	857,617	889,819	1,000,952
Joint Facility—Net Cr	606,935	617,291	455,806	352,528	335,575	351,049
Total Railway Operating Revenues	171,361,385	142,569,632	111,423,772	84,900,833	85,495,220	87,859,792
Railway Operating Expenses:						
Maintenance of Way and Structures	27,885,867	22,354,246	17,041,150	13,446,229	10,162,788	12,851,519
Maintenance of Equipment	31,136,446	28,181,134	21,755,076	18,683,044	17,240,737	16,349,617
Traffic	3,863,536	3,824,992	3,344,361	2,812,759	2,437,541	2,456,437
Transportation	60,471,448	53,124,009	43,165,900	33,545,311	31,374,166	33,346,658
Miscellaneous Operations	1,346,620	1,078,634	751,060	509,799	475,116	558,853
General	4,647,003	4,411,557	3,940,846	3,481,174	3,024,148	3,819,533
Transportation for Investment—Credit	550,059	678,767	728,947	400,197	117,655	227,070
Total Railway Operating Expenses	128,800,861	112,295,805	89,269,446	72,078,119	64,596,841	69,655,547
Income Items:						
Railway Tax Accruals	9,648,912	9,501,000	8,723,000	7,921,000	6,942,500	6,405,000
Uncollectible Railway Revenue	12,589	19,230	20,322	34,901	28,044	23,500
Equipment Rents—Net Dr.	3,995,309	2,064,100	2,466,186	2,767,638	2,599,646	2,716,490
Joint Facility Rents—Net Dr.	2,629,391	2,734,949	2,610,412	2,617,291	2,730,870	2,520,201
Total Income Items	16,286,201	14,319,279	13,819,920	13,340,830	12,301,060	11,665,191
Net Railway Operating Income	26,274,323	15,954,548	8,334,406	(Def.) 518,116	8,597,319	6,539,054
Net of Other Income Including Rent for Leased Roads	2,801,745	1,946,658	856,111	230,174	(Def.) 73,886	(Def.) 148,401
Total Income Before Interest on Funded Debt	29,076,068	17,901,206	9,190,517	(Def.) 287,942	8,523,433	6,390,653
Fixed Interest Accruals on Funded Debt	12,858,369	13,642,931	13,859,591	13,838,051	13,791,889	13,494,589
Net Income Available for Interest on Adjustment Mortgage Bonds	16,217,699	4,258,275	(Def.) 4,669,074	(Def.) 14,125,993	(Def.) 5,268,456	(Def.) 7,103,936
Contingent Interest on Adjustment Mortgage Bonds	9,143,685	9,143,685	9,143,685	9,143,685	9,143,685	9,143,685
Net Income (After Interest Accruals)	$7,074,014	(Def.) 4,885,410	(Def.) 13,812,759	(Def.) 23,269,678	(Def.) 14,412,141	(Def.) 16,247,621

Chicago, Illinois, March 30, 1935.

[fol. 420] EXHIBIT No. 8

Memo

Chicago, Illinois,
March 9, 1935.

On Friday, March 1, 1935, the undersigned received telegrams from Vice President, J. T. Gillick, reading as follows:

"I would like to see you 10 AM Monday, March 4 to discuss the ore pool on the Superior Division."

Accordingly meeting was held in Mr. Gillick's office. Those present were: Vice President J. T. Gillick; asst. to Vice Pres. C. M. Dukes; General Manager, O. N. Harstad; Gen. Supt. D. W. Kelly; Supt. F. T. Buechler; General Chairman P. L. Gray, BLE—R. O. Hughes, ORC—W. P. Kennedy, BRT and H J Toward, BLF&E.

Mr. Gillick explained that the Milwaukee Road ore docks at Escanaba were in a very poor condition and that it would cost about $60,000 to make temporary repairs and that the condition of the docks would not warrant such an expenditure. He also stated that it would cost $1,600,000 to build new docks and that the company did not have that amount of money to spend at this time. He further explained that the managements of the Milwaukee and Northwestern Railroads were working out an agreement whereby the ore service of the two railroads between the Menominee range and Escanaba would be pooled and handled over the Northwestern Railroad, and that a check of the iron ore handled by the Milwaukee and Northwestern Railroads out of the Menominee range for a ten year period, 1923 to 1932 inclusive, indicated that the average tons per year of ore mined on that range was 4,074,869, and of this amount the Milwaukee on the average handled 1,391,443 tons or 34%, and the Northwestern on the average handled 2,683,426 tons or 66%.

Mr. Gillick stated that under the pool arrangement, that was being considered the Milwaukee Road would furnish 34% and the Northwestern 66% of the power and equipment used in the ore pool service and that he had advised President Sargent of the Northwestern Railroad that he would insist on the agreement providing that Milwaukee

Road engine and train men be given 34% of such ore pool service.

After a very lengthy discussion the undersigned advised Mr. Gillick that they would discuss this matter with their respective representatives on the Superior Division and on March 4th a letter was addressed to the respective local chairmen advising them to meet in the office of General Chairman Gray and Toward in Chicago, at 9 AM, March 9th. Meeting was held accordingly and those present were: General Chairman P. L. Gray, Local Chairman W. E. Bartlett for the BLE—General Chairman R. O. Hughes and Local Chairman A. E. Eichwald for the ORC—General Chairman W P Kennedy and Local Chairman D. C. Tibbetts for the BRT—General Chairman H J Toward and Local Chairman J J Donckers for the BofLF&E.

[fols: 421-426] The information received from Mr. Gillick was imparted to the local committeemen and while they were all against the proposed iron ore pool, they advised that if we were forced to accept such an arrangement every effort should be made to secure not less than 34% of the iron ore switching and spotting service as well as ore pool service for Milwaukee Road train and engine men.

After a lengthy discussion it was agreed that on their return to Green Bay, the local chairmen would arrange for a joint meeting of the Superior Division memberships of the four organizations involved for the purpose of explaining the proposed change in the handling of the ore service.

It was further agreed that the four general chairmen would arrange for a conference with the General Chairmen of the transportation brotherhoods on the Northwestern Railroad, and, that the respective local chairmen would be promptly advised as to developments.

Perry L. Gray, Gen. Chrmn.BLE CMSTP&P RY.
R. O. Hughes, Gen. Chrmn.ORC—CMSTP&P RY.
W. P. Kennedy, Gen. Chrmn. BRT—CMSTP&P RY. H. J. Toward, Gen. Chrmn.BLF&E—CMSTP&PRY.

(Here follows 1 photolithograph, side folio 427)

Stanton
Covington
Lake Michigamme
ISHPEMING
NEGAUNEE
Baron Mine
Republic
M A R Q U E T T E
Skandia
Au Tre
Chatt
Carlshend
Gwin
Amasa
R O N
Floodwood
Trenary
Lathrop
IRON RIVER
CRYSTAL FALLS
Caspian
Alpha
Channing
Sagola
Ralph
Northland
Mashek
Watson
D I C K I N S O N
Randville
Felch
Hardwood
Foster City
Hendricks
D E L
Cornell
Rapid River
GLADSTONE
NOC
IRON MOUNTAIN
Norway
Quinnesec
Whitney
WELLS
ESCANABA
LITTLE BAY DE
Bark River
Harris
Harmansville
Powers
Spalding
Nadeau

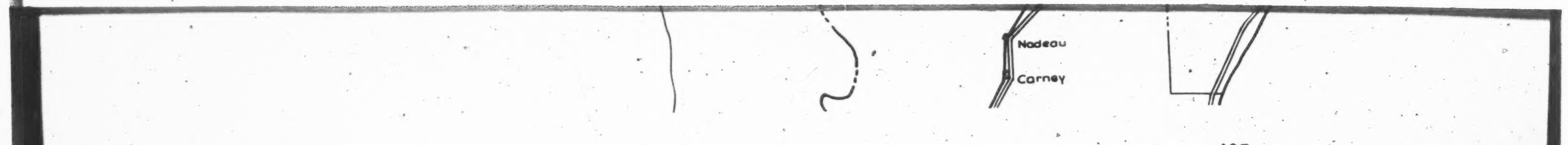

Nadeau
Carney

EXHIBIT No. 11

Escanaba and Lake Superior Railroad Company

Comparative Income Statement

I. Operating Income	1930	1931	1932	1933	1934
Ry. Operating Revenues	$361,373.54	$258,789.77	$184,563.83	$220,459.60	$236,093.30
Ry. Operating Expenses	279,763.59	203,849.13	166,654.78	157,462.35	169,586.42
Net Rev. from Ry. Oper.	81,609.95	54,940.64	17,909.05	62,997.25	66,506.88
Ry. Tax Accruals	46,475.42	46,751.65	29,731.21	34,061.60	31,754.35
Uncollectible Ry. Rev.	1.26	.....	37.96	.....	4.83
Ry. Operating Income	35,133.27	8,188.99	11,860.12†	28,935.65	34,747.70
Total Oper. Income	35,133.27	8,188.99	11,860.12†	28,935.65	34,747.70
II. Non-Oper. Income					
Rent from Locomotives	900.14	437.32	153.76	79.15	139.15
Rent from Work Equipment	1,950.14	738.87	5.00	.....	15.00
Joint Facility-Rent Inc.	63,262.16	54,301.70	34,117.67	47,570.63	47,080.61
Misc. Rent Income	1,025.00	1,045.00	961.00	961.00	779.75
Inc. fr. Unf. Sec. & Accts.	2,479.12	1,930.57	1,817.42	975.14	1,768.64
Misc. Income	1,077.53	538.69	76.89	239.75	73.42
Total Non-Oper. Income	70,694.09	58,992.15	37,131.74	49,825.67	49,856.57
Gross Income	105,827.36	67,181.14	25,271.62	78,761.32	84,604.27
III. Ded. from Gross Income					
Hire of Freight Cars	24,190.54	15,797.94	10,819.83	8,754.80	11,434.09
Joint Facility Rents	180.00	180.00	180.00	180.00	180.00
Miscellaneous Rents	117.99	117.99	117.99	117.99	117.99
Interest on Funded Debt	4,242.07	1,050.12	.....	.....	.....
Interest on Unfunded Debt	2.81	1,103.37	26.52†	5.70	6.22
Total Ded. fr. Gr. Income	28,733.41	18,249.42	11,091.30	9,058.49	11,738.30
Net Income	77,093.95	48,931.72	14,180.32	69,702.83	72,865.97
E. & L. S. Joint Wheelage	618,189	503,862	383,586	419,915	486,669
C. M. St. P. & P. Joint Wheelage	2,719,507	1,038,637	250,253	940,130	1,240,954
C. M. St. P. & P. Percentage	81.48	67.33	39.48	69.12	71.83

† Red in copy.

EXHIBIT No. 11A

Received in Evidence 5/18/35—C. E. S. Rec. 548

Docket No. 26903. Witness Heintz

Escanaba and Lake Superior Railroad Company

Comparative Income Statement

I. Operating Income	1923	1924	1925	1926	1927	1928	1929
Ry. Operating Revenues	$418,713.83	$446,348.09	$459,892.40	$457,207.80	$456,027.24	$435,748.51	$447,561.13
Ry. Operating Expenses	390,369.25	359,572.88	336,630.67	326,196.97	339,974.79	309,197.67	305,628.65
Net Rev. from Ry. Oper	28,344.58	86,775.21	123,261.73	131,010.83	116,052.45	126,550.84	141,932.48
Ry. Tax Accruals	36,544.55	34,824.42	48,300.73	59,571.67	52,383.12	51,957.94	52,515.57
Uncollectible Ry. Rev	376.16	247.07	447.67	199.83	68.49	12.14	6.21†
Ry. Operating Income	8,576.13†	51,703.72	74,513.33	71,239.33	63,650.84	74,580.76	89,423.12
Total Oper. Income	8,576.13†	51,703.72	74,513.33	71,239.33	63,650.84	74,580.76	89,423.12
II. Non-Oper. Income							
Rent from Locomotives	3,341.84	2,379.78	861.06	1,602.43	2,052.43	1,100.16	867.06
Rent from Work Equipment	3,512.50	4,030.13	1,399.36	2,015.54	2,833.31	1,939.76	1,863.50
Joint Facility-Rent Inc	58,646.11	66,708.58	61,834.86	61,325.45	62,473.73	63,434.51	65,229.31
Misc. Rent Income	.....	360.00	735.00	635.00	660.00	760.00	952.50
Inc. fr. Unf. Sec. & Accts	437.95	2,922.51	1,362.44	2,045.26	2,602.89	1,284.78	1,738.48
Misc. Income	1,542.73	5,298.77	5,274.18	5,313.83	3,108.62	5,136.72	1,731.32
Total Non-Oper. Income	67,481.13	81,699.77	71,466.90	72,937.51	73,730.98	73,655.93	72,382.15
Gross Income	58,905.00	133,403.49	145,980.23	144,176.84	137,381.82	148,236.69	161,805.27
III. Ded. from Gross Income							
Hire of Freight Cars	62,420.19	53,170.71	30,698.87	27,676.33	20,182.66	25,429.40	17,078.19
Joint Facility Rents	195.00	195.00	180.00	180.00	180.00	180.00	180.00
Misc. Rents	.....	.....	.....	.....	.....	.....	350.79
Interest on Funded Debt	21,300.00	19,378.26	14,470.81	13,890.00	13,839.84	11,006.66	7,744.74
Interest on Unfunded Debt	38.32	5.54	1.34	1,408.60	4.94	1.57	4.09
Total Ded. fr. Gr. Income	83,953.51	72,749.51	45,351.02	43,154.93	34,207.44	36,617.63	25,357.81
Net Income	25,048.51†	60,653.98	100,629.21	101,021.91	103,174.38	111,619.06	136,447.46
E. & L. S. Joint Wheelage	866,277	939,646	1,032,391	937,044	885,298	892,632	773,950
C. M. St. P. & P. Joint Wheelage	5,118,596	3,624,742	5,724,119	5,549,083	4,315,807	4,388,482	4,838,609
C. M. St. P. & P. Percentage	85.53	79.41	84.72	85.55	82.98	83.10	86.21

†Red figures, or deficit.

[fol. 430] EXHIBIT No. 12

Escanaba and Lake Superior Railroad Company

Detailed Statement of Income Account No. 501, Railway Operating Revenues for year ended December 31, 1931, by Primary Accounts

Class of Railway Operating Revenues	
Freight Revenue	$240,725.48
Passenger Revenue	344.99
Mail Revenue	5,488.77
Express Revenue	115.81
Milk Revenue	364.77
Switching Revenue	9,037.90
Storage Revenue—Freight	50.22
Demurrage Revenue	808.00
Telegraph & Telephone Revenue	584.81
Rent of Buildings & Other Property	1,188.00
Miscellaneous	81.02
Total	$258,789.77

Detailed Statement of Income Account No. 531, Railway Operating Expenses for year ended December 31, 1931, by General Accounts

Maintenance of Way & Structures	$47,917.65
Maintenance of Equipment	43,499.29
Traffic Expenses	3,850.04
Transportation Expenses	88,012.45
General Expenses	20,569.70
Total	$203,849.13

[fol. 431] EXHIBIT No. 13

Escanaba and Lake Superior Railroad Company

Detailed Statement of Income Account No. 501, Railway Operating Revenues for Year Ended December 31, 1932, by Primary Accounts

Class of Railway Operating Revenues	
Freight Revenue	$171,463.07
Passenger Revenue	190.68
Mail Revenue	5,428.77
Express Revenue	69.34
Milk Revenue	107.25
Switching Revenue	5,081.77
Storage Revenue—Freight	28.08
Demurrage Revenue	416.00
Telegraph & Telephone Revenue	456.10
Rent of Buildings & Other Property	1,248.00
Miscellaneous	74.77
Total	$184,563.83

Detailed Statement of Income Account No. 531, Railway Operating Expenses for Year Ended December 31, 1932, by General Accounts

Maintenance of Way & Structures	$37,684.03
Maintenance of Equipment	39,441.93
Traffic Expenses	3,505.31
Transportation Expenses	68,498.18
General Expenses	17,525.33
Total	$166,654.78

[fol. 432] EXHIBIT No. 14

Escanaba and Lake Superior Railroad Company

Detailed Statement of Income Account No. 501, Railway Operating Revenues for Year Ended December 31, 1933, by Primary Accounts

Class of Railway Operating Revenues

Freight Revenue	$204,009.48
Passenger Revenue	768.14
Mail Revenue	5,340.31
Express Revenue	41.50
Milk Revenue	39.21
Switching Revenue	6,341.73
Storage Revenue—Freight	1.20
Demurrage Revenue	582.00
Telegraph & Telephone Revenue	479.97
Rent of Buildings & Other Property	1,283.00
Miscellaneous	1,573.06
Total	$220,459.60

Detailed Statement of Income Account No. 531, Railway Operating Expenses for Year Ended December 31, 1933, by General Accounts

Maintenance of Way & Structures	$32,588.27
Maintenance of Equipment	39,221.71
Traffic Expenses	2,851.06
Transportation Expenses	68,488.11
General Expenses	14,313.20
Total	$157,462.35

[fol. 433] EXHIBIT No. 15

Escanaba and Lake Superior Railroad Company

Detailed Statement of Income Account No. 501, Railway Operating Revenues for Year Ended December 31, 1934, by Primary Accounts

Class of Railway Operating Revenues	
Freight Revenue	$218,006.77
Passenger Revenue	871.15
Mail Revenue	5,678.36
Express Revenue	88.64
Milk Revenue	19.76
Switching Revenue	5,599.17
Demurrage Revenue	863.00
Telegraph & Telephone Revenue	516.81
Rent of Buildings & Other Property	1,338.00
Miscellaneous	3,111.64
Total	$236,093.30

Detailed Statement of Income Account No. 531, Railway Operating Expenses for Year Ended December 31, 1934, by General Accounts

Maintenance of Way & Structures	$32,140.23
Maintenance of Equipment	40,636.60
Traffic Expenses	2,894.10
Transportation Expenses	75,610.50
General Expenses	18,304.99
Total	$169,586.42

[fol. 434] EXHIBIT No. 16

Escanaba and Lake Superior Railroad Company
Operating Accounts Affected by Joint Facility Credits

Account	Gross Expenses	Joint Facility Credit (C. M. St. T. & P.)	Net Expenses (borne by E. & L. S. R. R.)
1931			
Maintenance of Way & Structures..	$86,890.47	$38,972.82	$47,917.65
Transportation Expenses.....	101,297.87	13,285.42	88,012.45
General Expenses.....	24,634.73	4,065.03	20,569.70
	$212,823.07	$56,323.27	$156,499.80
1932			
Maintenance of Way & Structures..	$46,600.96	$8,916.93	$37,684.03
Transportation Expenses.....	73,699.94	5,201.76	68,498.18
General Expenses.....	19,689.29	2,163.96	17,525.33
	$139,990.19	$16,282.65	$123,707.54
1933			
Maintenance of Way & Structures..	$47,533.35	$14,945.08	$32,588.27
Transportation Expenses.....	77,663.10	9,174.99	68,488.11
General Expenses.....	17,874.26	3,561.06	14,313.20
	$143,070.71	$27,681.13	$115,389.58
1934			
Maintenance of Way & Structures..	$52,866.91	$20,726.68	$32,140.23
Transportation Expenses.....	86,290.46	10,679.96	75,610.50
General Expenses.....	22,132.37	3,827.38	18,304.99
	$161,289.74	$35,234.02	$126,055.72

[fol. 435] EXHIBIT No. 16A

Rec'd. in evidence 5/18/35—C. E. S., Rec. 548
Docket No. 26903. Witness, Heintz

Escanaba and Lake Superior Railroad Company
Operating Accounts Affected by Joint Facility Credits

Account	Gross Expenses	Joint Facility Credit (C. M. St. P. & P.)	Net Expenses (borne by E. & L. S. R. R.)
1923			
Maintenance of Way & Structures..	$217,375.26	$83,907.41	$133,467.85
Transportation Expenses.....	152,350.15	18,140.94	134,209.21
General Expenses.....	45,686.08	5,186.76	40,499.32
	$415,411.49	$107,235.11	$308,176.38
1924			
Maintenance of Way & Structures..	$212,380.74	$97,190.33	$115,190.41
Transportation Expenses.....	142,554.10	16,238.27	126,315.83
General Expenses.....	33,540.38	4,349.68	29,190.70
	$398,475.22	$117,778.28	$270,696.94
1925			
Maintenance of Way & Structures..	$170,214.71	$95,391.87	$74,822.84
Transportation Expenses.....	145,677.54	18,301.61	127,375.93
General Expenses.....	27,366.50	4,922.22	22,444.28
	$343,058.75	$118,615.70	$224,643.05
1926			
Maintenance of Way & Structures..	$181,174.86	$101,585.54	$79,589.32
Transportation Expenses.....	148,492.95	20,374.64	128,108.31
General Expenses.....	30,976.78	5,210.00	25,766.78
	$360,644.59	$127,170.18	$233,464.41

[fol. 436] EXHIBIT No. 16A—P. 2

Docket No. 26903. Witness, Heintz

Escanaba and Lake Superior Railroad Company

Operating Accounts Affected by Joint Facility Credits

Account	Gross Expenses	Joint Facility Credit (C. M. St. P. & P.)	Net Expenses (borne by E. & L. S. R. R.)
1927			
Maintenance of Way & Structures..	$242,715.38	$137,380.70	$105,334.68
Transportation Expenses.....	146,004.88	18,772.09	127,232.79
General Expenses.....	30,362.98	5,169.66	25,193.32
	$419,083.24	$161,322.45	$257,760.79
1928			
Maintenance of Way & Structures..	$197,672.00	$120,967.63	$76,704.97
Transportation Expenses.....	142,135.98	18,345.04	123,790.94
General Expenses.....	28,412.13	5,177.13	23,235.00
	$368,220.11	$144,489.80	$223,730.91
1929			
Maintenance of Way & Structures..	$190,751.68	$122,429.73	$68,321.95
Transportation Expenses.....	147,856.16	20,656.44	127,199.72
General Expenses.....	39,649.28	5,370.89	34,278.39
	$378,257.12	$148,457.06	$229,800.06
1930			
Maintenance of Way & Structures..	$159,978.26	$89,013.35	$70,964.91
Transportation Expenses.....	134,110.70	19,663.66	114,447.04
General Expenses.....	31,577.61	5,247.31	26,330.30
	$325,666.57	$113,924.32	$211,742.25

[fol. 437] EXHIBIT No. 17

Analysis of Income Statement

Adjusted to reflect C. M. St. P. & P. Joint Facilities Credits

	1931		
	As Reported (Including C. M. St. P. & P. credits)	C. M. St. P. & P. Proportion	Excluding C. M. St. P. & P. Proportion
I. Operating Income:			
Railway Operating Revenues..	$258,789.77		$258,789.77
Railway Operating Expenses..	203,849.13	56,323.27	260,172.40
Net Revenue from Ry. Oper....	54,940.64		1,382.63†
Railway Tax Accruals, Etc.*..	46,751.65		46,751.65
Railway Operating Income....	8,188.99		48,134.28†
II. Non-Operating Income.....	58,992.15	54,301.70	4,690.45
III. Ded. from Gross Income.....	18,249.42		18,249.42
Net Income.....	48,931.72	110,624.97	61,693.25†

† Red ink—deficit.

* Includes uncollectible railway revenue; also income tax accruals as originally stated, with no attempt of adjustment reflecting effect of C. M. St. P. & P. credits.

[fol. 438] EXHIBIT No. 18

Analysis of Income Statement

Adjusted to reflect C. M. St. P. & P. Joint Facilities Credits

	1932		
	As Reported (Including C. M. St. P. & P. credits)	C. M. St. P. & P. Proportion	Excluding C. M. St. P. & P. Proportion
I. Operating Income:			
Railway Operating Revenues	$184,563.83		$184,563.83
Railway Operating Expenses	166,654.78	16,282.65	182,937.43
Net Revenue from Ry. Oper.	17,909.05		1,626.40
Railway Tax Accruals, Etc.*	29,769.17		29,769.17
Railway Operating Income	11,860.12†		28,142.77†
II. Non-Operating Income	37,131.74	34,117.67	3,014.07
III. Ded. from Gross Income	11,091.30		11,091.30
Net Income	14,180.32	50,400.32	36,220.00†

† Red ink—deficit.

* Includes uncollectible railway revenue; also income tax accruals as originally stated, with no attempt of adjustment reflecting effect of C. M. St. P. & P. credits.

[fol. 438½] EXHIBIT No. 19

Analysis of Income Statement

Adjusted to reflect C. M. St. P. & P. Joint Facilities Credits

	1933		
	As Reported (Including C. M. St. P. & P. credits)	C. M. St. P. & P. Proportion	Excluding C. M. St. P. & P. Proportion
I. Operating Income:			
Railway Operating Revenues	$220,459.60		$220,459.60
Railway Operating Expenses	157,462.35	27,681.13	185,143.48
Net Revenue from Ry. Oper.	62,997.25		35,316.12
Railway Tax Accruals, Etc.*	34,061.60		34,061.60
Railway Operating Income	28,935.65		1,254.52
II. Non-Operating Income	49,825.67	47,570.63	2,255.04
III. Ded. from Gross Income	9,058.49		9,058.49
Net Income	69,702.83	75,251.76	5,548.93†

† Red ink—deficit.

* Includes uncollectible railway revenue; also income tax accruals as originally stated, with no attempt of adjustment reflecting effect of C. M. St. P. & P. credits.

[fol. 439] EXHIBIT No. 20

Analysis of Income Statement

Adjusted to reflect C. M. St. P. & P. Joint Facilities Credits

	1934		
	As Reported (Including C. M. St. P. & P. credits)	C. M. St. P. & P. Proportion	Excluding C. M. St. P. & P. Proportion
I. Operating Income:			
Railway Operating Revenues..	$236,093.30		$236,093.30
Railway Operating Expenses..	169,586.42	35,234.02	204,820.44
Net Revenue from Ry. Oper....	66,506.88		31,272.86
Railway Tax Accruals, Etc.*..	31,759.18		31,759.18
Railway Operating Income....	34,747.70		486.32†
II. Non-Operating Income.....	49,856.57	47,080.61	2,775.96
III. Ded. from Gross Income.....	11,738.30		11,738.30
Net Income.....	72,865.97	82,314.63	9,448.66†

† Red ink—deficit.

* Includes uncollectible railway revenue; also income tax accruals as originally stated, with no attempt of adjustment reflecting effect of C. M. St. P. & P. credits.

[fol. 440] EXHIBIT No. 21

Docket No. 26903. Witness ——

Commodities Transported by Escanaba and Lake Superior Railroad

	Number of Carloads			
	1931	1932	1933	1934
Products of Agriculture:				
Grain and Grain Products.....	68	64	83	117
Potatoes.....	7	31	38	37
Other Products of Agriculture....	25	95	99	85
Animals and Products:.....	123	130	96	98
Products of Mines:				
Bituminous Coal	1485	1629	2033	1979
Iron Ore.....	223	42	211	272
Other Products of Mines.....	169	563	129	131
Products of Forests:				
Logs.....	2582	1443	1280	2184
Lumber, Shingles and Laths.....	835	633	1309	1100
Pulpwood.....	1612	699	1752	2146
Ties.....	135	35	77	80
Other Products of Forests.....	2426	1154	1084	1739
Manufactures and Misc.....	3693	2965	3031	3415
Total Carload Traffic—Cars.....	13383	9483	11222	13383
	Number of Tons			
Total Carload Traffic—Tons.....	459,759	322,551	337,421	471,279
All L. C. L. Freight.....	3,905	2,714	2,576	2,427
Grand Total—All Traffic—Tons.....	463,664	325,265	339,997	473,706

[fol. 441] EXHIBIT No. 21A

Rec'd. in evidence 5/18/35—C. E. S. Rec. 548

Docket No. 26903. Witness, Heintz

Commodities Transported by Escanaba and Lake Superior Railroad

	Number of Carloads			
Products of Agriculture:	1927	1928	1929	1930
Grain and Grain Products	205	75	73	72
Potatoes	9	17	6	7
Other Products of Agriculture	127	169	95	52
Animals and Products:	156	185	165	156
Products of Mines:				
Bituminous Coal	1,297	1,687	2,279	1,676
Iron Ore	810	717	814	627
Other Products of Mines	807	721	1,331	862
Products of Forests:				
Logs	9,913	5,233	5,317	4,964
Lumber, Shingles and Laths	2,002	2,512	2,391	1,688
Pulpwood	2,137	1,887	2,162	2,614
Ties	229	289	205	141
Other Products of Forests	70	3,038	4,398	4,597
Manufactures and Misc.	3,450	3,640	3,978	4,069
Total Carload Traffic—Cars	21,212	20,170	23,214	21,525
	Number of Tons			
Total Carload Traffic	718,021	704,185	841,575	768,193
All L. C. L. Freight	6,730	6,914	6,497	5,337
Grand Total—All Traffic Tons	724,751	711,099	848,072	773,530

[fol. 442] EXHIBIT No. 22

Docket No. 26903. Witness ——

Tonnage Originated on Escanaba and Lake Superior Railroad

(West of Groos, Mich.)

Year 1934

Origin Stations*	Number of Carloads		
	To Local Destinations	To Off-Line Destinations	Total
Gladstone Crossing	.....	15	15
Lambert	.....	3	3
Chandler	.....	16	16
Grant Spur	.....	3	3
Cornell	3	17	20
Woodlawn	23	22	45
Hendricks	50	58	108
Watson	104	66	170
Mashek	377	92	469
Reade	19	29	48
Northland	40	8	48
Ross and Kates	98	25	123
Alfred	82	17	99
Lindsley	115	0	115
Ralph	17	11	28
Henderson	28	1	29
Turner	78	7	85
Total carloads	1,034	390	1,424

* And adjacent spurs or sidings.

[fol. 443] EXHIBIT No. 23

Docket No. 26903. Witness ——

Classification of Tonnage Originated on Escanaba and Lake Superior Railroad (West of Groos, Mich.)

Year 1934

Commodities	Destined to Local Points		Destined to Off-Line Points	
	Cars	Tons	Cars	Tons
Potatoes	.....	.....	35	650
Rutabagas	.....	.....	2	40
Sugar Beets	.....	.....	6	143
Hay and Grain	3	33	2	57
Machinery	.....	.....	1	12
Lumber	.....	.....	9	258
Logs	74	3,163	.....	.....
Ties	26	716	20	553
Posts and Poles	56	1,220	53	1,054
Mining Timbers	31	1,222	122	4,632
Other Forest Products	844	33,316	134	3,284
Total	1,034	39,670	390	10,683
			1,034	39,670
Total originated, west of Groos, Mich			1,424	50,353

[fol. 444] EXHIBIT No. 24

Docket No. 22103. Witness ———

Mine Production in Menominee Range

(Locality and Railroads Serving)

Year 1929

Mine	Locality	Tonnage Shipped		
		C. & N. W. Only	C. M. St. P. & P. Only	Both Roads
Aragon	Norway	208,433	.....	.....
Bates	Iron River	.....	.....	125,843
Bengal	Iron River	.....	.....	241,790
Berkshire	Iron River	215,635	.....	.....
Bristol	Crystal Falls	.....	.....	562,896
Brule	Iron River	.....	.....	.....
Buck	Iron River	153,675	.....	.....
Caspian	Iron River	335,885	.....	.....
Chapin	Iron Mountain	.....	.....	432,275
Davidson	Iron River	.....	.....	311,631
Florence	Florence	69,463	.....	.....
Forbes	Iron River	.....	.....	161,569
Fortune Lake	Crystal Falls	.....	.....	.....
Genesee	Crystal Falls	.....	.....	135,098
Great Western	Crystal Falls	.....	.....	.....
Hiawatha	Iron River	208,960	.....	.....
Homer	Iron River	.....	.....	176,749
James	Iron River	302,201	.....	.....
Judson-Balkan	Alpha	.....	.....	216,257
Loretta	Loretta	126,334	.....	.....
Monongahela	Crystal Falls	.....	.....	.....
Odgers	Crystal Falls	.....	30,441	.....
Penn Mines	Norway	.....	.....	472,381
Quinnesec	Quinnesec	.....	.....	.....
Riverton	Iron River	240,375	.....	.....
Rodgers	Iron River	.....	.....	323,363
Spies-Virgil	Iron River	.....	.....	175,078
Tobin	Crystal Falls	.....	.....	.....
Tully	Iron River	.....	.....	.....
Wauseca	Iron River	50,295	.....	.....
Warner	Amasa	.....	177,430	.....
Zimmerman	Iron River	149,880	.....	.....
Total		2,071,126	207,871	3,335,860

Authority: "The Iron Ores of Lake Superior"—Seventh Edition.

[fol. 445] EXHIBIT No. 25

Docket No. 26903. Witness ———

Lake Superior Iron Ore Shipments from Mines by Railroads to Upper Lake Ports and All Rail

Year 1929

Menominee Range Mine	To Upper Lake Ports C. & N. W.	C. M. St. P. & P.	All Rail	Total
Aragon	208,433	.....	.....	208,433
Balkan	49,130	4,123	.....	53,253
Baltic	9,456	.....	.....	9,456
Bates	75,245	50,598	.....	125,843
Bengal	232,972	8,037	781	241,790
Berkshire	215,635	.....	.....	215,635
Bristol	290,443	272,353	40	562,836
Buck	105,485	.....	.....	105,485
Caspian	335,885	.....	.....	335,885
Chapin	119,064	313,201	10	432,275
Davidson	160,336	151,268	27	311,631
Ernst	9,627	.....	.....	9,627
Florence	69,463	.....	.....	69,463
Fogarty	38,734	.....	.....	38,734
Forbes	86,034	75,535	.....	161,569
Genesee	46,420	88,672	6	135,098
Hiawatha	88,329	120,615	16	208,960
Homer	176,749	.....	.....	176,749
James	.....	302,289	12	302,301
Judson	154,003	8,996	.....	162,999
Loretto	136,334	.....	.....	136,334
Odgers	28,474	1,967	.....	30,441
Penn Mines	472,381	.....	.....	472,381
Riverton	117,549	122,826	.....	240,375
Rogers	118,524	205,353	6	323,883
Virgil	175,078	.....	.....	175,078
Warner	.....	176,495	934	177,429
Wauseca	50,305	.....	.....	50,305
West Chapin	21,170	.....	112	21,282
Zimmerman	149,860	.....	.....	149,860
Total	3,741,118	1,902,333	1,944*	5,645,395

* Includes 117 Tons Lost in Transit.

Mayville Range—No Shipments.

Canadian Mines—No Shipments.

[fol. 446] EXHIBIT No. 26

Docket No. 28903. Witness.——

Lake Superior Iron Ore Shipments from Mines by Railroads to Upper Lake Ports and All Rail

Year 1930

Menominee Range Mine	To Upper Lake Ports C. & N. W.	C. M. St. P. & P.	All Rail	Total
Aragon	185,166	.....	.....	185,166
Balkan	41,432	.....	.....	41,432
Baltic	11,470	.....	.....	11,470
Bates	80,407	30,251	.....	110,658
Bengal	41,633	.....	.....	41,633
Berkshire	146,477	.....	.....	146,477
Bristol	80,252	94,026	18	174,296
Buck	76,343	.....	.....	76,343
Caspian	148,252	.....	.....	148,252
Chapin	102,605	313,212	.....	415,817
Davidson Group	90,136	86,542	.....	176,678
Florence	62,508	.....	.....	62,508
Fogarty	18,986	.....	.....	18,986
Forbes	77,228	13,993	.....	91,221
Genesee	102,939	64,467	.....	167,406
Hiawatha	151,589	.....	.....	151,589
Homer	.....	136,866	.....	136,866
James	75,228	101,619	.....	176,847
Judson	103,725	.....	.....	103,725
Loretto	97,152	.....	.....	97,152
Odgers	5,421	11,298	.....	16,719
Penn Mines	343,459	.....	.....	343,459
Riverton	94,178	66,898	.....	161,076
Rogers	75,308	53,413	.....	128,721
Tobin	8,590	11,008	.....	19,598
Virgil	137,854	.....	.....	137,854
Warner	.....	177,139	1,193	178,332
West Chapin	13,079	12,952	.....	26,031
Zimmerman	62,740	.....	.....	62,740
Totals	2,434,157	1,173,684	1,211*	3,609,052

* Includes 29 Tons lost in transit.

[fol. 447] EXHIBIT No. 27

Docket No. 26903. Witness ———

Lake Superior Iron Ore Shipments from Mines by Railroads to Upper Lake Ports and All Rail

Year 1931

Menominee Range Mine	To Upper Lake Ports C. & N. W.	C. M. St. P. & P.	All Rail	Total
Aragon	77,168	.....	...	77,168
Balkan	9,628	.....	2	9,630
Baltic	537	.....	...	537
Bates	117,489(A)	.....	...	117,489
Bristol-Youngstown	39,866	45,822	...	85,688
Buck	17,295	.....	...	17,295
Caspian	33,422	.....	...	33,422
Chapin	92,167	123,983	...	216,150
Davidson Group	59,884	22,851	...	82,735
Florence	7,847(B)	.....	...	7,847
Fogarty	5,538	.....	...	5,538
Hiawatha	74,489(C)	41,955	...	116,444
James	69,931	.....	22	69,953
Judson	20,693	.....	14	20,707
Loretto	104,166	.....	...	104,166
Monongahela	.....	18,014	...	18,014
Penn Mines	50,471	.....	...	50,471
Riverton Group	9,309	55,259	...	64,568
Rogers	57,735	111,957	...	169,692
Sherwood	1,027	.....	...	1,027
Virgil	79,497	.....	...	79,497
Warner	.....	79,238	192	79,430
West Chapin	6,522	.....	...	6,522
Zimmerman	35,300	.....	...	35,300
Totals	969,981	499,079	230*	1,469,290

(A) Includes 106 Tons left in Dock
(B) " 49 " " " "
(C) " 64 " " " "
(*) " 22 " Lost in Transit.

[fol. 448] EXHIBIT No. 28

Docket No. 26903. Witness ———

Lake Superior Iron Ore Shipments from Mines by Railroads to Upper Lake Ports and All Rail

Year 1932

Menominee Range Mine	To Upper Lake Ports C. & N. W.	C. M. St. P. & P.	All Rail	Total
Bates	76,159	14,596	...	90,755
Bristol	2,537	.....	...	2,537
Fogarty	7,538	.....	...	7,538
Genesee	40,261	45,543	10	85,814
Hiawatha	21,817	19,629	...	41,446
Loretto	15,342	.....	298	15,640
Odgers	1,607	.....	...	1,607
Rogers	2,497	37,952	...	40,449
Tobin	2,214	7,588	...	9,802
Virgil	4,551	.....	...	4,551
Zimmerman	7,582	.....	...	7,582
Totals	182,105	125,308	308	307,721

[fol. 449] EXHIBIT No. 29

Docket No. 26903. Witness ———

Shipments from Mines by Railroads to Upper Lake Ports and All Rail

Year 1933

Menominee Range Mine	To Upper Lake Ports C. & N. W.	C. M. St. P. & P.	All Rail	Total
Balkan-Judson	49,723	2,959	...	52,682
Baltic	1,827	.....	...	1,827
Bates	10,077	48,396	...	58,473
Bengal	22,647	.....	...	22,647
Bristol	24,332	26,199	...	50,531
Buck	53,948	.....	...	53,948
Caspian	71,201	.....	30	71,231
Davidson Group	71,649	67,435	...	139,084
Fogarty	25,464	.....	...	25,464
Genesee	80,609	18,588	...	99,197
Hiawatha	51,267	92,275	...	143,542
Homer	21,082	63,694	...	84,776
James	10,090	20,367	...	30,457
Loretto	15,644	.....	...	15,644
Monongahela	18,501	44,788	...	63,289
Odgers	531	.....	...	531
Penn Mines	385,211	.....	...	385,211
Rogers	12,143	15,333	...	27,476
Sherwood	398	.....	...	398
Tobin	31,369	6,889	...	38,258
Virgil	48,889	.....	...	48,889
Warner	.....	97,013	417	97,430
Total	1,006,602	503,936	(A) 447	1,510,985

(A) Includes 30 tons lost in transit.

[fol. 450–452] EXHIBIT No. 30

Docket No. 26903. Witness ———

Lake Superior Iron Ore Shipments from Mines by Railroads to Upper Lake Ports and All Rail

Year 1934

Menominee Range Mine	To Upper Lake Ports C. & N. W.	C. M. St. P. & P.	All Rail	Total
Balkan-Judson	18,582	.....	595	19,177
Bates	74,696	73,382	.....	148,078
Bengal	7,668	.....	.....	7,668
Bristol	76,152	86,442	.....	162,594
Buck	10,629	.....	.....	10,629
Caspian	23,404	.....	.....	23,404
Chapin	91,526	99,467	.....	190,993
Davidson Group	27,101	23,487	.....	50,588
Fogarty	7,874	.....	.....	7,874
Forbes	19,796	.....	.....	19,796
Genesee	54,723	59,762	.....	114,485
Hiawatha	60,390	92,208	.....	152,598
James	42,039	.....	22	42,061
Loretto	50,087	.....	.....	50,087
Mono-gahela	23,550	48,335	.....	71,885
Odgers	26,785	25,500	.....	52,285
Penn Mines	57,012	.....	2,268	59,280
Tobin	5,451	7,228	224	12,903
Warner	.....	113,989	1,165	115,154
West Chapin	17,243	.....	.....	17,243
Zimmerman	6,245	.....	.....	6,245
Totals	700,953	629,800	4,274*	1,335,027

* Includes 246 tons lost in transit.

(Here follows one paster, side folio 453)

[fol. 453]

EXHIBIT No. 32

Escanaba & Lake Superior Railroad Company

Condensed Income Account and Dividend Appropriations for the Years Ended December 31st, 1923 to 1933 Inclusive

Items	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
Railway Operating Revenues	$418,714	$446,348	$459,892	$457,208	$456,027	$435,749	$447,561	$361,374	$258,790	$184,564	$220,459
Railway Operating Expenses	390,369	359,573	336,630	326,197	339,975	309,198	305,628	279,764	203,849	166,655	157,462
Taxes and Uncollectible Revenues	36,921	35,071	48,749	59,772	52,402	51,970	52,510	46,476	46,752	29,769	34,062
Net Earnings	Def. 8,576	51,704	74,513	71,239	63,650	74,581	89,423	35,134	8,189	Def. 11,860	28,935
Other Income	67,481	81,699	71,467	72,938	73,731	73,656	72,382	70,698	58,992	37,132	49,826
Gross Income	58,905	133,403	145,980	144,177	137,381	148,237	161,805	105,827	67,181	25,272	78,761
Interest Charges	21,300	19,378	14,471	13,890	13,840	11,009	7,749	4,245	2,153	.....	6
Other Charges	62,653	53,371	30,880	29,265	20,367	25,609	17,608	24,488	16,096	11,092	9,053
Net Income	Def. 25,048	60,654	100,629	101,022	103,174	111,619	136,448	77,094	48,932	$14,180	69,702
Dividend Appropriations	$34,650 (5%)	$34,650 (5%)	$69,300 (10%)	$103,950 (15%)	$103,950 (15%)	$69,300 (10%)	$69,300 (10%)	$69,300 (10%)	$34,650 (5%)	.....	$69,300 (10%)

[fol. 454]

EXHIBIT No. 33

Milwaukee Payments to Escanaba & Lake Superior R. R.
For or in Connection with Trackage Rights

Years	Operating Expenses						Add'ns. & Bett'mts.		
	Maint. of Way and Structures	Transportation (Other than train)	General	Total Operating Expenses	Taxes	Rental	Amortization & Interest on Certain Add'ns.	Certain Current Betterments	Grand Total Pay'mts.
1923	$33,907	$19,342	$5,187	$108,436	$12,984	$46,366	.....	.....	$167,786
1924	97,190	17,132	4,356	118,722	13,202	42,061	.....	.....	174,985
1925	95,592	19,532	4,922	119,846	14,449	45,632	$652	.....	180,579
1926	101,586	19,528	5,210	126,324	15,810	46,037	1,574	.....	189,745
1927	137,381	18,772	5,170	161,323	20,195	44,617	1,806	$28,273	256,214
1928	120,968	18,345	5,177	144,490	16,789	44,757	1,899	27,733	235,668
1929	122,430	20,656	5,871	148,457	18,531	46,388	1,887	37,564	252,827
1930	89,013	19,664	5,247	113,924	18,354	43,715	1,863	18,304	196,160
1931	38,973	15,285	4,065	56,323	13,519	35,967	1,828	2,587	110,244
1932	8,980	5,202	2,119	16,301	6,354	27,180	1,797	.....	51,632
Agv. 10 Yrs. 1923-1932	$89,582	$17,151	$4,682	$111,415	$15,019	$42,374	$1,330	$11,446	$181,584

[fol. 455] Secretary's certificate to statement of evidence omitted in printing.

[fol. 456] EXHIBIT No. F1

INTERSTATE COMMERCE COMMISSION

Docket No. 26903. (Date) 2/26, 1936.

I, A. C. Hagensick, Assistant Secretary of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, do hereby certify that the attached pamphlet, consisting of four (4) printed pages, is a full, true and correct copy of an agreement dated February 20, 1900, between the Escanaba & Lake Superior Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company, concerning the use of track of said Escanaba & Lake Superior Railroad Company between Channing Junction and Wells Junction, Michigan, and for connecting said track with ore dock tracks of the Chicago, Milwaukee and St. Paul Railway Company at Wells, Michigan. An executed original is in the files of the Office of the Secretary of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

I Further Certify that said Chicago, Milwaukee, St. Paul and Pacific Railroad Company is the legal successor to the said Chicago, Milwaukee and St. Paul Railway Company.

In Witness Whereof I have hereunto set my hand and affixed the corporate seal of said Chicago, Milwaukee, St. Paul and Pacific Railroad Company this 17th day of February, A. D. 1936.

A. C. Hagensick, Assistant Secretary, Chicago, Milwaukee, St. Paul and Pacific Railroad Co. (Seal.)

[fol. 457] T 168

This agreement, made and entered into this twentieth day of February, A. D. 1900, by and between the Escanaba & Lake Superior Railroad Company, a corporation of the State of Michigan, hereinafter called the "Escanaba Company," and the Chicago, Milwaukee & St. Paul Railway Company, a corporation of the State of Wisconsin, hereinafter called the "St. Paul Company,"

Witnesseth:

1. That the Escanaba Company owns and operates a certain main line of railroad extending from the City of Escanaba, in Delta County, to a point in the south line of Section Thirteen, Township Thirty-nine North, of Range Twenty-three West, in said county, which point is hereinafter called "Wells Junction," and thence to Watson, in the County of Marquette, a distance of about thirty-one miles; together with a certain branch line extending from a point on said main line, in the Northeast Quarter of the Northeast Quarter of Section Twelve of the town and range aforesaid, to the terminus of said branch in the East Half of Section Eighteen, in Township Thirty-nine North, of Range Twenty-two West, a distance of about two and ten one-hundredths miles; and that all the above mentioned places and premises are situate in the State of Michigan.

2. That the Escanaba Company proposes to extend said main line from Watson, in a general northwesterly direction, to a junction with the railroad of the St. Paul Company at or near Channing, in Dickenson County, in the state aforesaid, which said junction is hereinafter called "Channing Junction," and to fully complete such extension and have the same in readiness for the safe and convenient operation of traffic trains thereover on or before the first day of September, 1900.

3. That the St. Paul Company proposes to construct iron ore docks, coal docks, and merchandise docks on the waters of Little Bay de Noquette, in Section Eighteen, Township Thirty-nine North, Range Twenty-two (22) West, (in the Town of Wells in said Delta County), and to have said ore docks ready for use by said first day of September, 1900; and desires to connect its tracks leading to said ore docks with the main track of the Escanaba Company, at or near said Wells Junction.

4. That the St. Paul Company also desires the right to use, in the manner hereinafter set forth, the main line of the Escanaba Company between said Channing Junction and said Wells Junction, and the branch hereinabove described and hereinafter called the "Escanaba Company's Branch," together with the right to build, maintain and operate, under the provisions of this contract, branches and spurs from any

point or points on said main line, between the junctions aforesaid, and from any point or points on said branch.

5. That the Escanaba Company is willing to grant to the St. Paul Company all the aforesaid rights, upon the terms and conditions hereinafter set forth; and that in consideration of the premises and of the sum of One Dollar by each to the other paid, the receipt whereof is by each acknowledged, and in further consideration of their mutual and dependent covenants in this contract set forth the parties hereto have agreed, and do hereby agree, each with the other as follows, to-wit:

First. In regard to the extension of the railroad of the Escanaba Company from Watson to Channing Junction, it is hereby covenanted and agreed as follows, viz.:

(a) That the Escanaba Company shall, and said Company agrees that it will, at its own expense, provide the right of way and forthwith commence the work of constructing said extension, and will employ all the men and use all the means and diligence necessary for the prosecution of said work so that said extension shall be fully completed on or before the first day of September, 1900, and be then ready for the safe and convenient operation of traffic trains thereover.

(b) That the Escanaba Company shall, and said Company also agrees that it will, locate and construct said extension between the Escanaba River and its branches on the north, and the Ford River on the south, and in strict accordance with the plans and specifications of the Chief Engineer of the St. Paul Company (a copy of which plans and specifications, duly identified, is on file with each of the parties hereto), and that all said work of construction shall be subject to the direction and approval of said Chief Engineer.

(c) That if, in the opinion of said Chief Engineer, the Escanaba Company is not constructing said extension in accordance with said plans and specifications and to his satisfaction, or if, in his opinion, the Escanaba Company is not prosecuting said work with such diligence and efficiency as to insure its completion by said first day of September, 1900, then and in any such case the St. Paul Company, after giving to the Escanaba Company ten days' notice in writing of its intention so to do, may proceed at once to make said construction conform to the aforesaid plans and specifications,

or to complete any unfinished portion of said extension, as the case may be, and the Escanaba Company shall repay to [fol. 458] the St. Paul Company all the cost and expense which said last named Company has in anywise incurred in and about the matters aforesaid.

(d) That if said Escanaba Company shall, on or before the first day of April, 1900, request the St. Paul Company, in writing, to furnish the rails and fastenings necessary to complete the whole or any part of said extension, then said St. Paul Company shall, and it agrees that it will, furnish said rails and fastenings on board its cars at Chicago, or on board boats at said city, as the Escanaba Company may elect; and the Escanaba Company shall, and agrees that it will, pay to the St. Paul Company the market value of said rails and fastenings at the time of their delivery as aforesaid in Chicago, plus freight thereon at the rate of five mills per ton per mile, if they are transported by the St. Paul Company to Pembine or to Channing.

(e) That the Escanaba Company shall, and said Company agrees that it will, build a line of telegraph along its railroad from Wells Junction to Channing Junction, and have the same ready for use by or before said first day of September, 1900; that it will, when and as required by the Chief Engineer of the St. Paul Company, construct at such places as he may designate between said junctions, such side and passing tracks, water stations and fuel stations as he may deem necessary for the business contemplated herein; and that it will, except as otherwise provided in paragraph (f) next following, bear and pay all the cost and expense in anywise appertaining to all the matters mentioned in this "First" article.

(f) That the St. Paul Company may, at its own expense, make and maintain connections between its tracks leading to its ore docks in the Town of Wells, or to its yards in said town, with the main track of the Escanaba Company at and near Wells Junction, and may carry said first mentioned tracks, by means of a crossing structure, over and across any tracks now or hereafter laid by the Escanaba Company; provided always, that the lowest member of such crossing structure shall, at the point where it crosses the tracks of the Escanaba Company, be not less than twenty-five feet above the top of the rails now there laid.

Second. In regard to the use, by the St. Paul Company, of the main line of the Escanaba Company between Channing Junction and Wells Junction, and the branch aforesaid, it is hereby covenanted and agreed as follows, viz.:

(a) That the St. Paul Company may at all times run its freight trains, manned by its own crews, over and upon the premises aforesaid for the following purposes, and none other, viz.:

1. For the purpose of transporting iron ore from Channing and intermediate points on said main line to the ore docks which it proposes to build as aforesaid, in the Township of Wells, Delta County, Michigan, or to any car-ferry or other point of delivery in said township, or in or near the City of Escanaba, or to any iron industries located on said main line between said city and Channing, or located on any branch or spur which the St. Paul Company may build under the terms of this contract.

2. For the purpose of transporting from any iron industry, located as aforesaid, the product of any ore which the St. Paul Company has brought thereto, to any car-ferry or other point of delivery in the Township of Wells or in or near the City of Escanaba, or at or beyond Channing.

3. For the purpose of transporting coal from any dock, car-ferry, or other point of delivery in the Township of Wells, or in or near the City of Escanaba, to any point on any of the branches or spurs aforesaid, or to any point beyond Channing, and for its own use at Channing.

4. For the purpose of transporting timber and such other material as it may need to use in the construction and maintenance of such of its docks, wharfs, tracks, structures, and other property as may be located in the Town of Wells aforesaid, and in the construction and maintenance of such branches and spurs as it may build under the terms of this contract.

5. For the purpose of transporting all kinds of through freight traffic consigned from or to any point on the railroad of the St. Paul Company or its connecting lines beyond Channing, to or from any point beyond said County of Delta.

(b) That the St. Paul Company may carry, on any and all of the above mentioned trains, such employes, in addition to

its train crews, as it may deem necessary for the prosecution of its business hereinabove mentioned or referred to, and in transacting such business may use the Escanaba Company's side and passing tracks, fuel stations and water stations, telegraph line and other facilities between the junction points aforesaid.

(c) That the right granted to the St. Paul Company in subdivision "1" of paragraph (a) of this "Second" article, shall be sole and exclusive so far as relates to the transportation of iron ore destined for shipment, either by rail or by water, beyond said Escanaba Company's existing lines; and said Company agrees, so far as it lawfully may, that it will not itself transport, nor will it permit any person or persons, or any corporation, other than the St. Paul Company, to transport over any part of its said lines any iron ore destined as aforesaid, and that all such business shall be tendered to and carried by the St. Paul Company; provided, however, that nothing herein contained shall be construed so as to prohibit the Escanaba Company from hauling ship-[fol. 459] ments of iron ore consigned from any point on its lines to any other point on its lines, locally, if and whenever such shipments are not destined, directly or indirectly, to points beyond said existing lines.

(d) That the St. Paul Company shall have the right to run all its trains hereinabove mentioned and referred to upon and over the main line of the Escanaba Company between the junction points aforesaid, and upon and over the branch aforesaid, under such reasonable and customary rules and regulations as may from time to time be agreed upon and established by the respective General Managers of the parties hereto; and shall, for the purposes hereinabove specified, have free and uninterrupted use of the aforesaid premises of the Escanaba Company, so that the business contemplated in this "Second" article may be conducted as efficiently and uninterruptedly as if said business were conducted over the St. Paul Company's own lines; provided, however, that the freight trains of both parties hereto shall have equal rights upon said premises, and that in all cases passenger trains shall have preference over freight trains.

Third. In regard to the maintenance and operation of the Escanaba Company's main line between Channing Junc-

tion and Wells Junction, and its branch aforesaid, it is hereby covenanted and agreed as follows, viz.:

(a) That the Escanaba Company shall, and said Company agrees that it will, at all times keep and maintain the premises aforesaid, with their appurtenances, in reasonable condition and repair, so that they can be safely, efficiently, and economically operated, and that whenever, in the opinion of the General Manager of the St. Paul Company, the Escanaba Company fails so to do, then the St. Paul Company (after giving to the Escanaba Company ten days written notice of its intention) may put said premises or appurtenances into suitable condition for the safe operation of trains, and the Escanaba Company shall repay all the cost and expense incurred by the St. Paul Company for the purpose aforesaid.

(b) That whenever, in the opinion of the Chief Engineer of the St. Paul Company, any of the grades on the Escanaba Company's main line between Wells Junction and Watson are unsuitable for the convenient and economical running of trains thereover, then and in any such case and on being thereto duly notified, the Escanaba Company shall at once, and at its own expense, reduce said grades as said Chief Engineer may require, and under his direction; provided, however, that interest upon the cost of such reduction shall be paid by the St. Paul Company to the Escanaba Company, at the rate and times, and in the manner hereinafter specified.

(c) That the Escanaba Company shall, and said Company agrees that it will, keep accurate books of account, showing in detail all the expenses of maintaining and operating the premises which the St. Paul Company is in and by this contract permitted to use; and also showing the wheelage of engines and cars of all kinds run over the whole or any part thereof by each and all parties using the same; and will render to the St. Paul Company, monthly, statements showing in detail all the items aforesaid; and said books, so far as they relate to the matters aforesaid, shall be open during usual business hours to the inspection of the General Manager of the St. Paul Company, or of any person duly authorized by him.

(d) That expenses of maintenance shall, for the purposes of this contract, include the cost of any and all material

and labor necessary to preserve, repair, and renew the road bed, rails, ties, switches, railroad crossings, water stations, fuel stations, bridges, culverts, cattle guards, fences, highway and farm crossings, crossing signs and gates, signal posts, and telegraph line of and pertaining to the premises aforesaid, and to preserve, repair, and renew such depots and buildings, or parts thereof, as the St. Paul Company shall use under the terms hereof; together with the cost of all engine and train service employed in any such preservation, repairs, and renewals and the cost of all other things necessary to be done by the Escanaba Company in order to keep said premises in proper condition for the safe, efficient, and economical operation of trains thereon; provided always, that no extraordinary repairs or renewals, and no additions, betterments, or improvements shall be made upon or to said premises or any part thereof, without the consent of the St. Paul Company and that it shall not be charged with any part of the cost of preserving, renewing, or repairing any premises or appurtenances aforesaid which it does not use in transacting its business covered by this contract.

(e) That expenses of operation shall, for the purpose aforesaid, include the salary of the superintendent of said railroad, the wages of the train despatchers thereon, and of such telegraph operators, switchmen, flagmen, and other employes of the Escanaba Company as said St. Paul Company shall use in the transaction of its business; the wages of such clerks as are necessary to keep the accounts mentioned in this "Third" article; the cost of clearing snow and ice from the above mentioned premises of the Escanaba Company, and all taxes and license fees which may be lawfully levied or imposed on said premises.

(f) That the term "wheelage" as hereinabove used, shall, so far as relates to the main line between Wells Junction and Channing Junction, be taken to mean the number of miles run thereon by the engines and cars of all parties using the whole or any part thereof; and so far as relates to the Escanaba Company's branch, said term shall be taken to mean the number of engines and cars run by all parties from said main line onto said branch. In computing wheelage, each engine with tender shall in all cases be counted as two cars.

[fol. 460] Fourth. In regard to the compensation to be paid by the St. Paul Company for the use of the Escanaba Company's main line and branch aforesaid, it is hereby covenanted and agreed as follows, viz.:

(a) That the St. Paul Company shall, and said Company agrees that it will, pay to the Escanaba Company, as annual rent for the use of said premises, the sum of Ten thousand and thirty one and 68/100 ($10,031.68) Dollars, together with interest at the rate of one and one-half per cent per annum upon the cost of all passing tracks, water stations, fuel stations, and such other additions, betterments, or improvements as the Escanaba Company may from time to time, at the request or with the consent of the St. Paul Company, make (or may be required by law to make) to or upon said premises, and upon the cost of reducing any grades between Wells Junction and Watson which the St. Paul Company may require to be reduced, as hereinbefore provided.

(b) That said annual rent shall commence whenever the St. Paul Company begins to run its trains between Channing Junction and Wells Junction; and interest upon the cost of any of the works mentioned in the next preceding paragraph (a) shall commence as and when any such work is completed by the Escanaba Company; provided always, that the St. Paul Company shall not be required to pay rent for, or interest on the cost of, any tracks, structures, appurtenances, or appliances of the Escanaba Company which it does not use in handling its business contemplated in this contract.

(c) That each and all of the payments of rent and interest mentioned or referred to in this "Fourth" article, shall, during the continuance hereof, be made in equal monthly installments, and the first of said installments shall be due and payable to the Escanaba Company one month after the St. Paul Company has commenced to use the Escanaba Company's railroad between Channing Junction and Wells Junction; and all of said payments shall be made at the office of the last named Company in the Town of Wells, aforesaid.

(d) That the St. Paul Company shall, and said Company agrees that it will, also pay to the Escanaba Company a pro rata proportion of the expenses of the maintenance and operation of the premises aforesaid, as said expenses are

mentioned and defined in paragraphs (d) and (e) of the "Third" article hereof. Such proportion shall be as the use made by the St. Paul Company of said premises bears to the entire use made of the same by all parties using the whole or any part thereof; and such use shall be determined on a wheelage basis, as mentioned and defined in paragraph (f) of said "Third" article.

(e) That within twenty days after the presentation to it by the Escanaba Company of a monthly statement of the expenses of maintenance and operation and of wheelage (all as hereinbefore defined), for the month covered by said statement, the St. Paul Company shall pay to the Escanaba Company, at its office in the Town of Wells aforesaid, such a sum of money as shall reasonably approximate the St. Paul Company's pro rata share of said expenses for said month, which sum so paid shall be credited to the St. Paul Company on the books of the Escanaba Company; and as soon as possible after the close of each year, a final settlement shall be made between the parties hereto of all the expenses of maintenance and operation incurred during said year, and thereupon their pro rata proportions of such expenses shall be determined on the basis of their respective proportions of the aggregate wheelage for the entire year; and (as the case may be), the St. Paul Company shall then pay to the Escanaba Company any further amount that may be found due to the last named company at the settlement aforesaid, or the Escanaba Company shall refund to the St. Paul Company any over-payment which said Company may have theretofore made.

(f) That the St. Paul Company shall, and said Company agrees that it will, commence to run some or all of its trains hereinbefore mentioned, upon and over the premises of the Escanaba Company between Channing Junction and Wells Junction, whenever and as soon as said extension is fully completed from Watson to Channing Junction; provided, however, that if the said extension shall not be fully completed and in readiness for running traffic trains thereover by the first day of October, 1900, then the St. Paul Company may, if it so elects, postpone the running of its trains upon the main line of the Escanaba Company until April 1st, 1901.

(g) That if at any time prior to the completion of said extension from Watson to Channing Junction the St. Paul

Company shall desire to run any of its engines and trains over the Escanaba Company's main line between Wells Junction and Watson, and over its branch aforesaid, for the purpose of hauling timber and other material to be used in the construction of its proposed docks and structures, in the Township of Wells aforesaid, then the said St. Paul Company shall have the right to run said trains, manned by its own crews; and the Escanaba Company will make, and the St. Paul Company agrees to pay therefor, a just and reasonable charge per mile for each mile run by said trains, which charge shall be in full for the use, maintenance, and operation of the said premises of the Escanaba Company during the time said trains are so run.

(h) That each party shall pay to the other just and proper compensation for any right or service (not hereinbefore provided for), which said other party may grant or render to it; and all such payments, and all payments mentioned or referred to in this contract which are not in terms made payable at a certain time and place, shall be [fol. 461] made by the party liable therefor within twenty days after the presentation to it of an itemized statement of the matter for which such payment is claimed.

Fifth. In regard to the liabilities which each party assumes while running its trains on the main line and branch aforesaid, it is hereby covenanted and agreed as follows, viz.:

(a) That the Escanaba Company shall be bound to use only reasonable and customary care, skill, and diligence in maintaining and repairing the roadway, tracks, structures, and appliances of and pertaining to the premises which the St. Paul Company is, in and by this contract, granted the right to use; and that all the employes of the Escanaba Company, except engine men and train men, engaged in maintaining, repairing, and operating said premises, or any of them, shall, for the purposes of this contract, be deemed and taken to be the joint employes of both parties hereto.

(b) That the St. Paul Company shall not, by reason of any defect in said roadway, tracks, structures, or appliances, or by reason of the failure or neglect of the Escanaba Company to repair such defect, have or make against it any claim or demand for any loss damage, or injury whatsoever, arising from or growing out of such defect, neglect,

or failure; but in case the Escanaba Company shall fail to repair any such defect as aforesaid, within ten days after the St. Paul Company has given to it written notice, specifying the defect and requesting that it be repaired, then the St. Paul Company shall have the right to make the necessary repairs at once, and the Escanaba Company shall pay the cost thereof.

(c) That each party hereto shall and will, at all times, assume, bear, settle, and pay all loss, cost, damage, or injury which its property or property in its custody, or its employes or passengers may suffer while said parties are running their respective engines, cars, or trains upon or over any of the premises which are the subject of this contract, no matter how such loss, damage, or injury may occur; provided, however, and the parties hereto expressly covenant and agree, that in case of a collision between their respective engines, cars, or trains while on any of the premises aforesaid, the party whose employes are in fault shall be responsible for and shall settle and pay the entire loss and damage caused thereby; and in case such collision is caused by the fault of the employes of both parties or by the fault of a joint employe, each party shall bear and pay all the loss and injury which its own property or property in its custody, or its employes or passengers may suffer in consequence thereof.

(d) That each party shall and will, at all times, assume, bear, and pay all loss, damage or injury which its engines, cars, or trains, running as aforesaid upon any of the above mentioned premises, may do to third persons or to the property of third persons; and each party shall and will at all times, and does hereby, indemnify the other against all claims or demands for or on account of any loss or damage which each has hereinabove agreed itself to assume and bear.

(e) That in case any of the St. Paul Company's trains are wrecked while running on the tracks of the Escanaba Company, such wrecks shall at once be picked up and removed by said St. Paul Company, and it shall, except as herein otherwise expressly provided, bear all the cost of such service.

(f) That in case a suit shall be commenced by any person or persons, corporation or corporations against the

Escanaba Company, founded upon any damage or injury done by the St. Paul Company's engines, cars, or trains while the same are on any of the tracks which said Company is hereby allowed to use, the Escanaba Company may give notice thereof to said St. Paul Company, and thereupon said last named Company shall assume the defence of said suit, and shall and will save and hold the Escanaba Company harmless from all loss or cost by reason thereof.

Sixth. In regard to the construction and operation of branches and spurs leading from the Escanaba Company's main line between Wells Junction and Channing Junction, and from its aforesaid branch, it is hereby covenanted and agreed as follows, viz.:

(a) That the St. Paul Company may, at its own expense, at any and all times build, maintain, and operate branches and spurs leading from any point or points on the main line of the Escanaba Company, between the junctions aforesaid, to any mines or iron industries now or hereafter developed or established; and may, at like expense, connect all such branches and spurs with said main line.

(b) That at any and all times during the life of this contract the Escanaba Company shall have the right to use, in periods of not less than one year, said branches and spurs, or any of them, for the purpose of hauling thereon and thereover, with its own trains, manned by its own crews, any and all forest products, and any and all articles manufactured therefrom at any point on, near, or tributary to any of said branches or spurs, or at any point on, near or tributary to the railroad of the Escanaba Company, or any branch owned by said last named Company; and the St. Paul Company, so far as it lawfully may, hereby agrees that the right aforesaid shall be enjoyed solely and exclusively by the Escanaba Company, and that during said last named Company's use as aforesaid of any such branch or spur, the St. Paul Company shall not itself, nor will it permit any person, or any corporation, other than the Escanaba Company, to handle thereon any of the aforesaid traffic, but that all such traffic shall be tendered to and carried by the Escanaba Company; provided, however, that [fol. 462] nothing herein contained shall be construed so as to prevent the St. Paul Company from hauling over any of said branches, timber and such other material as it may

need to use in the construction and maintenance of such of its docks and other property as are located in the Township of Wells aforesaid, and in the construction and maintenance of any branches and spurs provided for in this agreement.

(c) That for the use as aforesaid of any such branch or spur the Escanaba Company shall, and said Company agrees that it will, pay to the St. Paul Company interest on the cost thereof, at the rate of one and one-half per cent. (1½ per cent.) per annum, for each yearly period during the whole or any part of which the said Escanaba Company shall run its trains on said branch; together with a proportion of the expense of maintaining and operating said branch, based upon the proportion of its wheelage thereon; the maintenance, operation, and wheelage aforesaid shall be conducted and computed, and the compensation aforesaid be paid substantially in the same manner as is hereinbefore provided in regard to the use by the St. Paul Company of the Escanaba Company's main line.

(d) That the St. Paul Company may also build, at its own expense, and thereafter use, such branch tracks and spur tracks leading from the Escanaba Company's branch aforesaid, as it may desire to build in order to reach and do business with any coal dock, merchandise dock, or other dock, or any warehouse or industry, or any car-ferry situated in the Town of Wells aforesaid, or in or near the City of Escanaba; and the Escanaba Company may at any time have joint and equal use with the St. Paul Company of any of the branch tracks or spur tracks mentioned in this paragraph (d), by paying to the St. Paul Company one-half of the cost of such branch or spur track, and one-half the cost of maintaining and repairing the same.

(e) That in using any of the St. Paul Company's premises mentioned or referred to in this "Sixth" article, the Escanaba Company shall, during the term of such use, be subject to the same rules and regulations and shall assume the same obligations and liabilities as are hereinbefore set forth in regard to the use by the St. Paul Company of the Escanaba Company's premises.

Seventh. In regard to the use of the Escanaba Company's railroad between the City of Escanaba and Wells

Junction, and to the building of branch tracks or spur tracks therefrom between said points, it is hereby covenanted and agreed as follows, viz.:

(a) That if at any time during the continuance of this contract the St. Paul Company shall desire to use that portion of the Escanaba Company's railroad lying between the points aforesaid, and shall notify the Escanaba Company in writing of such desire, then said St. Paul Company may use said premises during the then remaining term hereof; provided always, that for such use it shall pay to the Escanaba Company interest, at the rate of one and one-half per cent. per annum upon the then value of said premises, and a proportion of the cost of the maintenance and operation thereof on a wheelage basis; and that all the terms and conditions of this contract relating to the Escanaba Company's railroad between Wells Junction and Channing Junction, shall apply to the premises between said City of Escanaba and Wells Junction, so far as said terms and conditions are in anywise applicable.

(b) That the St. Paul Company may also build, at its own expense, and thereafter use, such branch tracks and spur tracks leading from the Escanaba Company's railroad between Wells Junction nad the City of Escanaba, as it may desire to build in order to reach and do business with any coal dock, merchandise doc', or other dock, or any warehouse or industry, or any car-ferry situated in the Town of Wells aforesaid, or in or near the City of Escanaba; and the Escanaba Company may at any time have joint and equal use with the St. Paul Company of any of the branch tracks or spur tracks mentioned in this paragraph (b), by paying to the St. Paul Company one-half the cost of such branch or spur track and one-half the cost of maintaining and repairing the same.

Eighth. In regard to the settlement of disputes, the giving of notices, the discharge of employes, and the failure of any covenant herein contained, it is hereby covenanted and agreed as follows, viz.:

(a) That if at any time a question shall arise, touching the construction of any part of this contract, or concerning the business or the manner of transacting the business to be carried on under the provisions thereof, or concerning the observance or performance of any of the conditions therein

contained, upon which question they cannot agree, then such question shall be submitted to the arbitrament of three disinterested persons, familiar with such business and experienced in railway management, to be chosen: One by the Escanaba Company, one by the St. Paul Company, and the third by the two so chosen; that the party desiring such arbitration shall select its arbitrator and give written notice thereof to the other party, and in such notice shall also state precisely the matter or matters which it proposes to bring before the arbitrators, and only the matters so stated shall be considered or decided by them.

That if the Escanaba Company or the St. Paul Company shall fail to name an arbitrator within ten days after notice as aforesaid has been by the other given to it, the arbitrator named by the party giving such notice may and shall name and appoint an arbitrator for and on behalf of the party so in default, and the arbitrator so named and appointed shall have the same power and authority as if he had been chosen by such party.

[fol. 463] That the arbitrators shall, so soon as possible after their selection, meet to hear and decide the questions submitted to them, and shall give to each party reasonable notice of the time and place of such meeting; and after hearing both parties and taking such testimony or making such investigations as they, the said arbitrators, may deem necessary, they shall make in writing their award upon the question or questions so submitted to them, and shall serve a copy of such award on each party hereto; and the award of said arbitrators, or of a majority of them, shall be final and binding upon said parties, and each or either shall immediately make such changes in the conduct of its business, or such payments or restitution, as the case may be, as are in and by such awards required of it to be made; provided, however, that the books and papers of both parties, so far as they relate to any matter submitted to arbitration, shall be open to the examination of the arbitrators, and that the party against whom the award shall be made shall pay all the fees and expenses of the arbitration; and provided also, that until the arbitrators shall make their award upon any question submitted to them, the business, settlements, and payments to be transacted and made under the terms of this agreement, shall continue to be transacted and made in the manner and form existing prior to the arising of such question.

(b) That all the notices which are hereinbefore provided to be given by either party to the other may be given by serving the same upon the General Manager for the time being of such party.

(c) That in case any employe of the St. Paul Company shall neglect or refuse to obey the rules established by the Escanaba Company for the government of trains on any of the above mentioned premises, such employe shall, upon the written request of the Superintendent of the Escanaba Company, be prohibited by the St. Paul Company from running on and over said premises; and in case the St. Paul Company shall file with the Escanaba Company written objection to the employment of any joint employe engaged in the operation of trains over said premises, such joint employe shall not be continued in such employment, except at the Escanaba Company's sole risk.

Lastly. This contract shall take effect from the day of the date hereof, and be and remain in force until the first day of January, A. D. 1921, and during its continuance all the terms hereof shall be binding upon the parties hereto, and their respective successors, grantees, lessees, or assigns.

In Witness Whereof, the Escanaba Company and the St. Paul Company have caused this agreement to be signed in duplicate by their respective Presidents, thereto duly authorized, and their respective corporate seals to be hereto affixed and properly attested, this twentieth day of February, A. D. 1900.

Escanaba & Lake Superior Railroad Company,
(Sgd.) by Isaac Stephenson, President.

Attest: (Sd.) Horace A. J. Upham, Secretary. (Seal.)

Chicago, Milwaukee & St. Paul Railway Company,
(Sgd.) by A. J. Earling, President.

Attest: (Sgd.) P. M. Myers, Secretary. (Seal.)

[fol. 464] [Endorsed:] Escanaba & Lake Superior Railroad Co., with Chicago, Milwaukee & St. Paul Railway Co. Agreement. Dated, February 20, 1900. Expires, January 1, 1921.

[fol. 465] EXHIBIT No. F-1-a

I, A. C. Hagensick, Assistant Secretary of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, do Hereby Certify, That the attached pamphlet, consisting of twenty-two (22) printed pages, is a full, true and correct copy of an agreement dated January 1, 1921, executed August 16, 1921, between the Escanaba & Lake Superior Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company, concerning the use of track of said Escanaba & Lake Superior Railroad Company between Channing Junction and Wells Junction, Michigan, and for connecting said track with ore dock tracks of the Chicago, Milwaukee and St. Paul Railway Company at Wells, Michigan. An executed original is in the files of the Office of the Secretary of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

I Further Certify that said Chicago, Milwaukee, St. Paul and Pacific Railroad Company is the legal successor to the said Chicago, Milwaukee and St. Paul Railway Company.

In Witness Whereof I have hereunto set my hand and affixed the corporate seal of said Chicago, Milwaukee, St. Paul and Pacific Railroad Company this 17th day of February, A. D. 1936.

A. C. Hagensick, Assistant Secretary, Chicago, Milwaukee, St. Paul and Pacific Railroad Co. (Seal.)

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Escanaba & Lake Superior Railroad Co. with Chicago, Milwaukee & St. Paul Railway Co.

Agreement

Dated Jany. 1, 1921, Executed August 16, 1921, Expires January 1, 1951

[fol. 467] This Agreement, made and entered into this 1st day of January, A. D., 1921, by and between the Escanaba & Lake Superior Railroad Company, a corporation of the State of Michigan, hereinafter called the "Escanaba Company," and the Chicago, Milwaukee & St. Paul Railway Company, a corporation of the State of Wisconsin, hereinafter called the "St. Paul Company."

Witnesseth:

1. That the Escanaba Company owns and operates a certain main line of railroad extending from the City of Escanaba, in Delta County, Michigan, to a point in the south line of Section Thirteen, Township Thirty-nine North, of Range Twenty-three West, in said county, which point is hereinafter called Point "A" and thence to a junction with the railroad of the St. Paul Company at or near Channing, in Dickinson County, in the State aforesaid, which said junction is hereinafter called "Channing Junction," together with a certain branch line extending from a point on said main line, in the Northeast Quarter of the Northeast Quarter of Section Twelve of the town and range aforesaid, called "Wells Junction", to the terminus of said branch in the East Half of Section Eighteen, in Township Thirty-nine North, of Range Twenty-two West, a distance of about two and one-tenth miles, hereinafter called the Wells branch; and that all the above mentioned places and premises are situate in the State of Michigan.

2. That the St. Paul Company owns and operates a receiving and sorting yard which is connected with iron ore docks on the waters of Little Bay de Noquette in Section Eighteen (18), Township Thirty-nine (39) North, Range Twenty-two (22) West (in the Town of Wells in said Delta County), and has connected its said yard with the main track of the Escanaba Company at a point near Point "A" and [fol. 468] at a point in the Southeast quarter of the Northeast quarter of said Section Twelve (12) near Wells Junction; and also owns and operates a coal dock on the waters of Little Bay de Noquette in said Section Eighteen (18) on which are tracks connecting with the said Wells branch.

3. That the St. Paul Company desires the right to use, in the manner hereinafter set forth, the main line of the Escanaba Company between said Channing Junction and said Point "A" and Wells branch, together with the right to build, maintain and operate, under the provisions of this contract, branches and spurs from any point or points on said main line, between Point "A" and Channing Junction aforesaid, and from any point or points on said Wells branch.

4. That the Escanaba Company is willing to grant to the St. Paul Company all the aforesaid rights, upon the terms

and conditions hereinafter set forth; and that in consideration of the premises and of the sum of One Dollar by each to the other paid, the receipt whereof is by each acknowledged and in further consideration of their mutual and dependent covenants in this contract set forth, the parties hereto have agreed and do hereby agree, each with the other as follows, to-wit:

First. In regard to the use by the St. Paul Company of the main line of the Escanaba Company between Channing Junction and Point "A" and the branch aforesaid and branches or spurs constructed by the St. Paul Company hereunder or of which the St. Paul Company has acquired the use under article "Seventh" hereof, it is hereby covenanted and agreed as follows, viz.:

(a) That the St. Paul Company may at all times run its freight trains, manned by its own crews, over and upon the [fol. 469] premises aforesaid for the following purposes, and none other, viz.:

1. For the purpose of transporting iron ore from Channing and from any point on any of the branches or spurs aforesaid to the said ore docks of the St. Paul Company or to any iron industry hereafter established in the Township of Wells, Delta County, Michigan, or to any ore docks located on any branch or spur aforesaid.

2. For the purpose of transporting coal from any coal dock in the Township of Wells, or in or near the City of Escanaba to and for use by any mine located on any of the branches or spurs aforesaid, or to any point beyond Channing and for its own use at Channing and at its said receiving and sorting yard near Wells Junction and elsewhere.

3. For the purpose of transporting timber and such other material as it may need to use in the construction and maintenance of such of its docks, tracks, structures and other property as may be located in the Town of Wells aforesaid and in the construction and maintenance of such branches and spurs as it may build under the terms of this contract.

(b) That the St. Paul Company may carry, on any and all of the above mentioned trains, such employes, in addition to its train crews, as it may deem necessary for the prosecution of its business hereinabove mentioned or re-

ferred to and in transacting such business may use the Escanaba Company's side and passing tracks, fuel stations and water stations, telegraph line and other facilities between the points aforesaid.

(c) That the right granted to the St. Paul Company in subdivisions "1" and "2" of paragraph (a) of the "First" article, shall be sole and exclusive so far as relates to the transportation of iron ore and coal, and the Escanaba Com- [fol. 470] pany agrees, so far as it lawfully may, that it will not permit any person or persons or any corporation, other than the St. Paul Company, to transport over any part of its said lines any shipments of iron ore or coal destined for shipment by rail or by water beyond said Escanaba Company's existing lines, and that all such business shall be tendered to and carried by the St. Paul Company, provided, however, that nothing herein contained shall be construed so as to prohibit the Escanaba Company from hauling over its lines, shipments of iron ore originating on its said line, or any branch or spur now or hereafter constructed by it east of Channing Junction for shipment by water from the St. Paul Company's said ore docks under a reasonable and equitable joint agreement which shall be entered into between the parties hereto, if and when the Escanaba Company may desire to so haul and handle iron ore, but the handling of any such ore over the docks of the St. Paul Company shall be dependent upon the ability of said Company to handle it upon its then existing dock or docks, and also upon the preferential use of said dock or docks for ore transported in the trains of the St. Paul Company.

(d) That the St. Paul Company shall have the right to run all its trains hereinabove mentioned and referred to, upon and over the main line of the Escanaba Company between the points aforesaid, and upon and over the branch aforesaid, under such reasonable and customary rules and regulations as may from time to time be agreed upon and established by the respective General Managers of the parties hereto; and shall, for the purposes hereinabove specified, have free and uninterrupted use of the aforesaid premises of the Escanaba Company, so that the business contemplated in this "First" article may be conducted as efficiently and uninterruptedly as if said business were conducted over the St. Paul Company's own lines; provided, however, that

the freight trains of both parties hereto shall have equal [fol. 471] rights upon said premises, and that in all cases passenger and mixed trains shall have preference over freight trains; provided further that the trains of the St. Paul Company shall have the preference over the trains of like class of any other tenant.

Second. In regard to the maintenance and operation of the Escanaba Company's main line between Channing Junction and Point "A" and its branch aforesaid, it is hereby covenanted and agreed as follows, viz.:

(a) The Escanaba Company claims and the St. Paul Company admits that at the date of this contract the ore traffic of the St. Paul Company requires a better track and roadbed than is necessary for the present traffic of the Escanaba Company, and may require, so long as traffic conditions of the two lines continue substantially as at present, certain expenditures not otherwise necessary. Because of this the St. Paul Company agrees to assume and pay for such part of the cost of additions and betterments to the track and roadbed as are or may become necessary solely because of the heavier wheel loads of the engines and cars of the St. Paul Company, or as may be called for by the St. Paul Company, as the number of miles run by the cars and engines of the St. Paul Company shall bear to the total number of miles run by the cars and engines of all companies operating over the tracks, the joint use of which is covered by this agreement; each engine to be counted as two cars. Such payment as above provided to be made in the same manner as herein provided for the payment of the expenses of maintenance and operation. Provided, however, that in making renewals of the present rails and tracks fastenings seventy-five (75) pound rail and track fastenings shall be used, or heavier if the General Managers of the respective Companies shall so agree, and it is hereby agreed that the entire cost thereof shall [fol. 472] be borne and paid for in the same pro rata proportions and in the same manner as herein provided for the payment of the expenses of maintenance and operation.

(b) That the Escanaba Company shall, and said Company agrees that it will, at all times keep and maintain the premises aforesaid, with their appurtenances, in reasonable condition and repair, so that they can be safely, effi-

ciently and economically operated; and that whenever, in the opinion of the General Manager of the St. Paul Company, the Escanaba Company fails so to do, then the St. Paul Company (after serving on the General Manager of the Escanaba Company ten days written notice of its intention) may put said premises or appurtenances into suitable condition for the safe operation of trains, and the Escanaba Company shall repay all the cost and expense incurred by the St. Paul Company for the purpose aforesaid.

(c) In the event that, during the term of this contract, the Escanaba Company, by law of the United States or the State of Michigan or by order or regulation of the Interstate Commerce Commission, the Michigan Public Utilities Commission or any other commission, department or body having jurisdiction of the Escanaba Company, the Escanaba Company is required to construct, install or erect any addition, betterment or appliance upon, or to be used in connection with the operation of that portion of its railroad, the use of which is granted herein to the St. Paul Company, the St. Paul Company hereby agrees to pay to the Escanaba Company the same pro rata proportion of the cost thereof and in the same manner as the St. Paul Company pays a pro rata proportion of the expenses of maintenance and operation for the year in which said addition, betterment or appliance is constructed, installed or erected.

(d) Whenever the president of the St. Paul Company [fol. 473] shall make request in writing upon the president of the Escanaba Company for a reduction in the existing grades, the strengthening of bridges and culverts, the extension of existing passing tracks, the construction of additional passing tracks, water stations, fuel stations, section houses and telegraph stations and other additions and betterments, the Escanaba Company will, within a reasonable time thereafter, make such grade reductions and other additions and betterments mentioned above as may be reasonably required. The entire cost of said grade reductions, additions and betterments shall, in the first instance, be paid for by the Escanaba Company, and there shall be included in the cost thereof, interest paid by the Escanaba Company on the amount expended by it, from time to time, during the period of construction plus the cost to the Esca-

naba Company of financing such construction. The cost of such construction shall be set up in a separate account as the same is made. At the end of each year the balance of said account shall be divided by the number of years remaining before the expiration of this contract and the quotient sum so determined, plus interest for the year on the balance of said account at the beginning of the year, at the rate the Escanaba Company is then paying for money borrowed to make such improvements or, in case said Company owes no money, borrowed for such purpose, then at a rate to be agreed upon by the General Managers of the respective Companies, together with like interest on amounts paid for construction during the year from the date of payment to the end of the year, shall be included in the joint account for the year, and the St. Paul Company hereby agrees to pay to the Escanaba Company the same pro rata proportion thereof as the St. Paul Company is obligated to pay of the expenses of maintenance and operation for the five (5) years next preceding. If said five year period shall reach back and overlap one or more years covered [fol. 474] by the prior contract between the parties hereto, dated February 20th, 1900, then the payments made for those years by the St. Paul Company under that contract shall be included for the purposes of such computation.

The Escanaba Company, before obligating itself for the payment of any money to be borrowed by it to finance any such construction, shall first obtain the consent of the General Manager of the St. Paul Company to the plan of such financing, including the rate of interest to be paid.

(e) That the Escanaba Company shall and said Company agrees that it will keep accurate books of account, showing in detail all the expenses of maintaining and operating the premises which the St. Paul Company is in and by this contract permitted to use; and also showing the wheelage of engines and cars of all kinds run over the whole or any part thereof by each and all parties using the same; and will render to the St. Paul Company, monthly statements, showing in detail all the items aforesaid; and said books, so far as they relate to the matters aforesaid, shall be open during usual business hours to the inspection of the General Manager of the St. Paul Company, or of any person duly authorized by him.

(f) That expenses of maintenance shall, for the purposes of this contract, include the cost of any and all material and labor necessary to preserve, repair and renew the roadbed, rails, ties, switches, railroad crossings, water stations, fuel stations, bridges, culverts, cattle guards, fences, highway and farm crossings, crossing signs and gates, signal posts and telegraph line and any and all other appurtenances of and pertaining to the premises, the use of which is herein granted; and to preserve, repair and renew such depots and buildings, or parts thereof, as the St. Paul Company shall use under the terms hereof, together with the cost of all engine and train service employed in any such [fol. 475] preservation, repairs and renewals and the cost of all other things necessary to be done by the Escanaba Company in order to keep said premises in proper condition for the safe, efficient and economical operation of trains thereon; provided always that no extraordinary repairs or renewals, and no additions, betterments, or improvements shall be made upon or to said premises or any part thereof, without the consent of the St. Paul Company; and that it shall not be charged with any part of the cost of preserving, renewing or repairing any premises or appurtenances aforesaid which it does not use in transacting its business covered by this contract.

(g) That expense of operation shall, for the purpose aforesaid, include such proportion of the salary of the General Manager of said railroad, the wages of the road master, superintendent and train dispatchers thereon, as may be agreed upon by the General Managers of the respective Companies and such proportion of the wages of such telegraph operators, switchmen, flagmen and other employes of the Escanaba Company as said St. Paul Company shall use in the transaction of its business, and such proportion of the wages of such clerks as are necessary to keep the accounts mentioned in this "Second" article, as may be agreed upon by the General Managers of the respective Companies; the cost of clearing snow and ice from the above mentioned premises of the Escanaba Company the right to use which is granted the St. Paul Company and all taxes and license fees which may be lawfully leveed or imposed on said premises.

(h) That the term "wheelage" as hereinabove used, shall, so far as relates to the main line between Point "A" and

Channing Junction, be taken to mean the number of miles run thereon by the engines and cars of all parties using the whole or any part thereof; and so far as relates to the [fol. 476] Wells branch, said term shall be taken to mean the number of engines and cars run by all parties from said main line onto said branch. In computing wheelage, each engine with tender shall in all cases be counted as two cars.

Third. In regard to the compensation to be paid by the St. Paul Company for the use of the Escanaba Company's main line and branch aforesaid, it is hereby covenanted and agreed as follows, viz.:

(a) That the St. Paul Company shall, and said Company hereby agrees that it will pay to the Escanaba Company, at its office in the town of Wells, Michigan, as annual rent for the use of said premises, a pro rata proportion of the sum of Fifty-four Thousand Dollars ($54,000.00), which proportion shall be as the use made by the St. Paul Company of said premises bears to the entire use made of the same by all parties using the whole or any part thereof, and such use shall be determined on a wheelage basis, as mentioned and defined in paragraph (h) of the "Second" article hereof. Said annual rent shall be paid in monthly installments of Thirty-four Hundred Dollars ($3,400.00) each, which shall become due and payable respectively on the last day of each calendar month during the life of this agreement, the first of which installments of Thirty-four Hundred Dollars ($3,400.00) shall be due and payable January 31, 1921; provided that after the close of each calendar year and as soon as may be, the entire annual rent for that year shall be computed and determined on the basis aforesaid, and if such annual rent so determined shall exceed the sum of Forty Thousand Eight Hundred Dollars ($40,800.00), then such excess shall be forthwith due and payable. But if such annual rent shall be less than Forty Thousand Eight Hundred Dollars ($40,800.00), then the difference shall be forthwith refunded by the Escanaba Company to the St. Paul Company; provided, nevertheless, [fol. 477] that the sum so to be refunded shall in no event reduce the annual rent for any year below a minimum annual rental in the sum of Twenty-seven Thousand Dollars ($27,000.00).

(b) That the St. Paul Company shall and said Company agrees that it will also pay to the Escanaba Company a

pro rata proportion of the expenses of the maintenance and operation of the premises aforesaid, as said expenses are mentioned and defined in paragraphs (f) and (g) of the "Second" article hereof. Such proportion shall be as the use made by the St. Paul Company of said premises bears to the entire use made of the same by all parties using the whole or any part thereof, and such use shall be determined on a wheelage basis, as mentioned and defined in paragraph (h) of said "Second" article.

(c) That within twenty days after the presentation to it by the Escanaba Company of a monthly statement of the expenses of maintenance and operation and of wheelage (all as hereinbefore defined), for the month covered by said statement, the St. Paul Company shall pay to the Escanaba Company, at its office in the Town of Wells aforesaid, such a sum of money as shall reasonably approximate the St. Paul Company's pro rata share of said expenses for said month, which sum so paid shall be credited to the St. Paul Company on the books of the Escanaba Company; and as soon as possible after the close of each year, a final statement shall be rendered of all the expenses of maintenance and operation incurred during said year, showing the pro rata proportion of such expenses chargeable to each party on the basis of their respective proportions of the aggregate wheelage for the entire year of all the parties using the whole or any part of the premises the use of which is granted herein to the St. Paul Company; and (as the case may be), the St. Paul Company shall then pay to the Escanaba Company any further amount that may be [fol. 478] found due to the last named Company, or the Escanaba Company shall refund to the St. Paul Company any over-payment which said Company may have theretofore made.

(d) That each party shall pay to the other, just and proper compensation for any right or service (not hereinbefore provided for), which said other party may grant or render to it; and all such payments, and all payments mentioned or referred to in this contract which are not in terms made payable at a certain time and place, shall be made by the party liable therefor within twenty days after the presentation to it of an itemized statement of the matter for which such payment is claimed.

Fourth. In regard to the liabilities which each party assumes while running its trains on the main line and branch aforesaid, it is hereby covenanted and agreed as follows, viz.:

(a) That the Escanaba Company shall be bound to use only reasonable and customary care, skill and diligence in maintaining and repairing the roadway, tracks, structures and appliances of and pertaining to the premises which the St. Paul Company is, in and by this contract, granted the right to use; and that all the employes of the Escanaba Company, except engine men and train men, engaged in maintaining, repairing and operating said premises, or any of them, shall, for the purposes of this contract, be deemed and taken to be the joint employes of both parties hereto.

(b) That the St. Paul Company shall not, by reason of any defect in said roadway, tracks, structures or appliances, or by reason of the failure or neglect of the Escanaba Company to repair such defect, have or make against it any claim or demand for any loss, damage or injury whatso- [fol. 479] ever, arising from or growing out of such defect, neglect or failure; but in case the Escanaba Company shall fail to repair any such defect as aforesaid, within ten days after the St. Paul Company has given to it written notice, specifying the defect and requesting that it be repaired, then the St. Paul Company shall have the right to make the necessary repairs at once and the Escanaba Company shall pay the cost thereof.

(c) That each party hereto shall and will, at all times, assume, bear, settle and pay all loss, cost, damage or injury which its property or property in its custody, or its employes or passengers may suffer while said parties are running their respective engines, cars or trains upon, or over any of the premises which are the subject of this contract, no matter how such loss, damage or injury may occur; provided, however, and the parties hereto expressly covenant and agree, that in case of a collision between their respective engines, cars or trains while on any of the premises aforesaid, the party whose employes are alone in fault shall be responsible for and shall settle and pay the entire loss and damage caused thereby; and in case such collision is caused by the fault of the employes of both parties or by

the fault of a joint employe, each party shall bear and pay all the loss and injury, which its own property or property in its custody, or its employes or passengers may suffer in consequence thereof.

(d) That each party shall and will, at all times, assume, bear and pay all loss, damage or injury which its engines, cars or trains, running as aforesaid upon any of the above mentioned premises, may do to third persons or to the property of third persons; and each party shall and will at all times, and does hereby indemnify the other against all claims or demands for, or on account of any loss or damage which each has hereinabove agreed itself to assume and bear.

[fol. 480] (e) That in case any of the St. Paul Company's trains are wrecked while running on the tracks of the Escanaba Company, such wrecks shall at once be picked up and removed by said St. Paul Company, and it shall, except as herein otherwise expressly provided, bear all the cost of such service.

(f) That in case a suit shall be commenced by any person or persons, corporation or corporations against the Escanaba Company, founded upon any damage or injury done by the St. Paul Company's engines, cars, or trains while the same are on any of the tracks which said Company is hereby allowed to use, the Escanaba Company may give notice thereof to said St. Paul Company and thereupon said last named Company shall assume the defense of said suit and shall and will save and hold the Escanaba Company harmless from all loss, expense or cost by reason thereof.

Fifth. In regard to the construction and operation of branches and spurs leading from the Escanaba Company's main line between Point "A" and Channing Junction and from its aforesaid branch, it is hereby covenanted and agreed as follows, viz.:

(a) That the St. Paul Company may, at its own expense, at any and all times, build, maintain and operate branch tracks and spur tracks leading from any point or points on the main line of the Escanaba Company, between Point "A" and Channing Junction aforesaid, to any mines or iron industries hereafter developed or established; and may, at like expense, connect all such branches and spurs with said main line.

(b) That at any and all times during the life of this contract, the Escanaba Company shall have the right to use, in periods of not less than one year, said branch tracks and spur tracks, or any of them, for the purpose of hauling [fol. 481] thereon and thereover, with its own trains, manned by its own crews, any and all forest products and any and all articles manufactured therefrom at any point on, near or tributary to any of said branches or spurs, or at any point on, near or tributary to the railroad of the Escanaba Company, or any branch owned by said last named Company; and the St. Paul Company, so far as it lawfully may, hereby agrees that the right aforesaid shall be enjoyed solely and exclusively by the Escanaba Company and that during said last named Company's use, as aforesaid, of any such branch or spur, the St. Paul Company shall not itself, nor will it permit any person or any corporation, other than the Escanaba Company, to handle thereon any of the aforesaid traffic, but that all such traffic shall be tendered to and carried by the Escanaba Company; provided, however, that nothing herein contained shall be construed so as to prevent the St. Paul Company from hauling over any of said branches, timber and such other material as it may need to use in the construction and maintenance of such of its docks and other property as are located in the Township of Wells aforesaid, and in the construction and maintenance of any branches and spurs provided for in this agreement; and provided further, that the Escanaba Company will, so far as it can lawfully do so, deliver to the St. Paul Company any and all said traffic originating on said branches and spurs, which is destined to points on, or reached via the lines of the St. Paul Company; and will likewise route or influence the routing, so far as it is able to do so, via the St. Paul Company's lines, of any and all shipments of machinery or other freight destined to points on said branches or spurs.

(c) That for the use as aforesaid of any such branch or spur, the Escanaba Company shall, and said Company agrees that it will pay to the St. Paul Company interest on [fol. 482] the cost thereof at the rate of three (3) per cent. per annum, for each yearly period during the whole or any part of which the said Escanaba Company shall run its train on said branch, together with a proportion of the expense of the maintenance and operation thereof, based upon the

proportion of its wheelage thereon with a minimum of twenty-five (25) per cent. The maintenance, operation and wheelage aforesaid shall be conducted and computed and the compensation aforesaid be paid substantially in the same manner as is hereinbefore provided in regard to the use by the St. Paul Company of the Escanaba Company's main line.

(d) That the St. Paul Company may also build, at its own expense and thereafter use, such branch tracks and spur tracks leading from the Wells branch aforesaid, as it may desire to build in order to reach and do business with any coal dock, ore dock, or iron industry now or hereafter established, situated in the Town of Wells aforesaid, or in or near the City of Escanaba, except the plant now owned by the Stephenson Charcoal Iron Company.

(e) That in using any of the St. Paul Company's branch tracks or spur tracks mentioned or referred to in paragraph (b) of the "Fifth" article for the purposes therein mentioned only, the Escanaba Company shall, during the term of such use, be subject to the same rules and regulations, and shall assume the same obligations and liabilities as are hereinbefore set forth in regard to the use by the St. Paul Company of the Escanaba Company's premises.

Sixth. In regard to the use of the Escanaba Company's railroad between the City of Escanába and Point "A" and to the building of branch tracks or spur tracks therefrom, between said points, it is hereby covenanted and agreed as follows, viz.:

[fol. 483] (a) That if at any time during the continuance of this contract the St. Paul Company shall desire to use that portion of the Escanaba Company's railroad lying between the points aforesaid, and shall notify the Escanaba Company in writing of such desire, then said St. Paul Company may use said premises during the then remaining term hereof, or any part thereof in periods of not less than one year; provided always, that for such use it shall pay to the Escanaba Company interest on the cost thereof at the rate of three (3) per cent. per annum, together with a proportion of the expense of the maintenance and operation thereof, based upon the proportion of its wheelage thereon with a minimum of twenty-five (25) per cent; and that all the terms and conditions of this contract relating to the Escanaba

Company's railroad between Point "A" and Channing Junction, shall apply to the premises between said City of Escanaba and Point "A", so far as said terms and conditions are in anywise applicable.

(b) That the St. Paul Company may also build, at its own expense and thereafter use such branch tracks and spur tracks leading from the Escanaba Company's railroad between Point "A" and the City of Escanaba, as it may desire to build in order to reach and do business with any coal dock, ore dock or iron industry situated in the Town of Wells aforesaid, or in or near the City of Escanaba.

Seventh. In regard to the use by either Company of branch tracks and spur tracks hereafter built by the other Company to any ore dock, coal dock, mine or iron industry, it is hereby covenanted and agreed as follows:

(a) That either Company may at any time acquire the right to use any of said branch tracks and spur tracks built by the other by paying one-half the cost thereof. The use [fol. 484] thereof by the Escanaba Company shall be limited only by the use thereof by the St. Paul Company as provided in Article "First" hereof and nothing contained in this Article "Seventh" shall be construed to limit the rights of the Escanaba Company under paragraph (b) of Article "Fifth" hereof, or of the St. Paul Company under article "sixth" hereof.

(b) That during the time of such joint use of any of the branch tracks or spur tracks, each Company shall be subject to the same rules and regulations and shall assume the same obligations and liabilities as are hereinbefore set forth in regard to the use of the Escanaba Company's main line and branch.

(c) That the Escanaba Company shall maintain and operate such branch tracks and spur tracks as are used jointly by the parties hereto, as above provided, in the same manner as is herein provided for the maintenance and operation of the main line and branch of the Escanaba Company, and each party hereto shall pay a pro rata proportion of the expense of such maintenance and operation thereof as the use made by each party thereof bears to the entire use made of the same by all parties using the whole or any part thereof, and such use shall be determined on a wheelage basis, as

mentioned and defined in paragraph (h) of the "Second" article hereof and payments therefor shall be made in the manner as provided in paragraph (e) of the Article "Third" hereof.

Eighth. In regard to the settlement of disputes, the giving of notices, the discharge of employes and the failure to observe and perform any covenant or condition herein contained, it is hereby covenanted and agreed as follows, viz.:

(a) That if at any time a question shall arise, touching the construction of any part of this contract, or concerning the business or the manner of transacting the business to be [fol. 485] carried on under the provisions thereof, or concerning the observance or performance of any of the covenants or conditions therein contained, upon which question the parties hereto cannot agree, or their General Managers cannot agree upon any question herein referred to them for agreement, then such question shall be submitted to the arbitrament of three disinterested persons familiar with such business and experienced in railway management, to be chosen, one by the Escanaba Company, one by the St. Paul Company and the third by the two so chosen; that the party desiring such arbitration shall select its arbitrator and give written notice thereof to the other party, and in such notice shall also state precisely the matter or matters which it proposes to bring before the arbitrators and only the matters so stated shall be considered or decided by them.

That if the Escanaba Company or the St. Paul Company shall fail to name an arbitrator within thirty days after notice as aforesaid has been by the other given to it, the arbitrator named by the party giving such notice, may and shall name and appoint an arbitrator for and on behalf of the party so in default and the arbitrator so named and appointed shall have the same power and authority as if he had been chosen by such party.

That the arbitrators shall, as soon as possible after their selection, meet to hear and decide the questions submitted to them and shall give to each party reasonable notice of the time and place of such meeting; and after hearing both parties and taking such testimony or making such investigations as they, the said arbitrators, may deem necessary, they shall make in writing their award upon the question or questions so submitted to them and shall serve a copy of such award on each party hereto, and the award of said arbi-

trators, or of a majority of them, shall be final and binding upon said parties and each or either shall immediately make such changes in the conduct of its business, or such pay-
[fol. 486] ments or restitution, as the case may be, as are in and by such awards required of it to be made; provided, however, that the books and papers of both parties, so far as they relate to any matter submitted to arbitration, shall be open to the examination of the arbitrators and that the party against whom the award shall be made shall pay all the fees and expenses of the arbitration; and provided also, that until the arbitrators shall make their award upon any question submitted to them, the business, settlements and payments to be transacted and made under the terms of this agreement, shall continue to be transacted and made in the manner and form existing prior to the arising of such question.

(b) That all the notices which are hereinbefore provided to be given by either party to the other, may be given by serving the same upon the General Manager for the time being of such party.

(c) That in case any employe of the St. Paul Company shall neglect or refuse to obey the rules established by the Escanaba Company for the government of trains on any of the above mentioned premises, such employe shall, upon the written request of the General Manager of the Escanaba Company, be prohibited by the St. Paul Company from running on and over said premises; and in case the St. Paul Company shall file with the Escanaba Company written objection to the employment of any joint employe engaged in the operation of trains over said premises, such joint employe shall not be continued in such employment, except at the Escanaba Company's sole risk.

Ninth. That at the termination of this contract and in the event of a renewal thereof, or in the event of the making of a new contract, it is hereby mutually agreed that in determining the valuation of the property to be used, there shall [fol. 487] be deducted the pro rata proportion of the cost of grade reductions, additions and betterments paid by the St. Paul Company under and in pursuance of the provisions of paragraph (d) of Article "Second" hereof. In the event of the making of a new contract or the renewal of this contract, as above in this article provided, the value of the

property to be covered by and included in such contract, in case the parties hereto cannot agree thereon, shall be determined by arbitrators to be selected in the same manner as herein provided for the selection of abitrators.

If, at any time on or before the termination of this contract, the Escanaba Company desires to sell its entire railroad property, including real and personal property, or the whole or any part separately of the property, the use of which is herein granted to the St. Paul Company, the Escanaba Company agrees that the St. Paul Company shall have the preferential right to purchase the same; and in case of the purchase by the St. Paul Company the pro rata proportion of the cost of grade reductions, additions and betterments paid by the St. Paul Company under and in pursuance of the provisions of paragraph (d) of Article "Second" hereof, shall be deducted from the purchase price.

Lastly. This contract shall take effect from the day of the date hereof to-wit, the first day of January, A. D., 1921, and be and remain in force until the first day of January, A. D., 1951, and during its continuance all the terms hereof shall be binding upon the parties hereto, and their respective successors, grantees, lessees or assigns.

In Witness Whereof, the Escanaba Company and the St. Paul Company have caused this agreement to be signed in duplicate, by their respective Presidents thereto duly [fols. 488-490] authorized and their respective corporate seals to be hereto affixed and properly attested this 16 day of August, A. D., 1921.

Escanaba & Lake Superior Railroad Company, by William E. Black, President.

Attest: Harry J. Brown, Secretary. (Seal.)

Chicago, Milwaukee & St. Paul Railway Company, by H. E. Byram, President.

Attest: E. W. Adams, Secretary. (Seal.)

Exhibits "F-2" and "F-3" are omitted from printing because they are duplicates of exhibits 2 and 3.

[fol. 491] EXHIBIT No. F-4

Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees

Revenues, Expenses and Income—Year 1935

Items	Amount
Railway Operating Revenues:	
Freight	$77,311,239
Passenger	6,041,992
Mail	3,002,951
Express	1,554,768
All Other Transportation	3,121,387
Incidental	1,058,014
Joint Facility—Cr.	383,442
Railway Operating Revenues	92,473,793
Railway Operating Expenses:	
Maintenance of Way and Structures	17,023,868
Maintenance of Equipment	17,849,146
Traffic	2,546,099
Transportation	36,184,971
Miscellaneous Operations	629,470
General	2,592,933
Transportation for Investment—Cr.	409,970
Railway Operating Expenses	76,416,517
Income Items:	
Railway Tax Accruals	5,992,000
Uncollectible Railway Revenue	27,096
Equipment Rents—Net Dr.	2,750,695
Joint Facility Rents—Net Dr.	2,563,502
Total Income Items	11,333,293
Net Railway Operating Income	4,723,983
Other Income—Net	1,311,731
Income Available for Fixed Charges	6,035,714

Exhibit No. F-4—Continued

Fixed Charges:		
Rent for Leased Roads		1,109,414
Interest on Funded Debt (Fixed Interest)		13,227,619
Interest on Unfunded Debt		543,390
Amortization of Discount on Funded Debt		20,354
Total Fixed Charges		14,900,777
Income after Fixed Charges	Def.	8,865,063
Contingent Charges:		
Interest on Funded Debt (Contingent Interest on Adjustment Mortgage Bonds)		9,143,685
Net Income	Def.	$18,008,748

Chicago, Ill., Feb. 19, 1936. 6034.

[fol. 492]

EXHIBIT No. F-5

Chicago, Milwaukee, St. Paul & Pacific R. R. Co.

Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees

C. M. St. P. & P. R. R. and C. & N. W. Ry.

Iron Ore: From Menominee Range and as Handled over Escanaba Docks—Gross Tons Year 1923–1935 Inclusive

	Menominee Range				Handled over Escanaba Docks			
	C. M. St. P. & P. (C. M. St. P. & P. Record)		C. & N. W. (C. & N. W. Record)	Total Menominee Range (Railroad Record)	C. M. St. P. & P. (C. M. St. P. & P. Record)		C. & N. W.* (C. & N. W. Record)	Total Escanaba Docks* (Railroad Record)
Years	Tons	% of Total Menominee Range	Tons	Tons	Tons	% of Total Escanaba Docks	Tons	Tons
1923	1,813,888	37.8%	2,984,622	4,798,510	1,813,888	32.3%	3,796,813	5,610,701
1924	1,291,135	33.8	2,534,418	3,825,553	1,291,135	30.4	2,952,549	4,243,684
1925	1,978,536	38.1	3,215,877	5,194,413	1,978,536	35.0	3,672,435	5,650,971
1926	1,965,602	33.5	3,898,641	5,864,243	1,965,602	29.8	4,626,728	6,592,330
1927	1,562,771	30.0	3,637,948	5,200,719	1,562,771	26.6	4,303,687	5,866,458
1928	1,602,094	33.1	3,235,383	4,837,477	1,602,094	29.2	3,884,698	5,486,792
1929	1,902,334	33.7	3,741,122	5,643,456	1,902,334	30.0	4,445,776	6,348,110
1930	1,173,682	32.5	2,434,157	3,607,839	1,173,682	28.6	2,923,130	4,096,812
1931	499,081	34.0	969,981	1,469,062	499,081	31.0	1,109,183	1,608,264
1932	125,307	40.8	182,107	307,414	125,307	38.0	204,343	329,650
Avg. 10 yrs. 1923–32 Incl.	1,391,443	34.0	2,683,426	4,074,869	1,391,443	30.2	3,191,934	4,583,377
1933	503,936	33.4	1,006,603	1,510,539	503,936	30.6	1,144,044	1,647,980
1934	629,801	47.3	700,951	1,330,752	629,801	40.8	913,936	1,543,737
1935	465,602	28.5	1,168,277	1,633,879	465,602	25.5	1,358,053	1,823,655

(6039)

* Includes Tonnage from Marquette Range handled by C. & N. W. over Escanaba Docks.

(Here follows one paster side folio 493.)

[fol. 493]

EXHIBIT No. F-6

Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees

Milwaukee Payments to Escanaba & Lake Superior R. R. for or in Connection with Trackage Rights
With E. & L. S. Proportion of Divided Expenses—1923 to 1935 Incl.

	Operating Expenses												
	Maintenance of Way and Structures		Transportation (Other than Train)		General		Taxes		Amortization & Interest on certain Additions		Certain current Betterments		Rental	Total Milwaukee Proportion: Operating Expenses, Taxes, Rental and Additions & Betterments	Total E. & L. S. Proportion: Operating Expenses, Taxes and Additions & Betterments
Items	C. M. St. P. & P. Propn.	*E. & L. S. Propn.	C. M. St. P. & P. Propn.	E. & L. S. Propn.	C. M. St. P. & P. Propn.	E. & L. S. Propn.	C. M. St. P. & P. Propn.	E. & L. S. Propn.	C. M. St. P. & P. Propn.	E. & L. S. Propn.	C. M. St. P. & P. Propn.	E. & L. S. Propn.	C. M. St. P. & P. Propn.		
1923	$83,907	$13,959	$19,342	$3,272	$5,187	$877	$12,984	$2,196	.....	.....	.....	.....	$46,366	$167,786	$20,304
1924	97,190	25,007	17,182	4,455	4,350	1,128	13,202	3,423	.....	.....	.....	.....	43,061	174,985	34,013
1925	95,392	17,099	19,532	3,523	4,922	888	14,449	2,718	$652	$139	.....	.....	45,632	180,579	24,367
1926	101,586	17,007	19,528	3,298	5,210	880	15,810	2,807	1,574	366	.....	.....	46,037	189,745	24,358
1927	137,381	28,004	18,772	3,850	5,170	1,060	16,618	3,577	1,806	347	$28,273	$5,799	44,617	252,637	42,637
1928	120,968	24,399	18,345	3,731	5,177	1,053	16,789	3,549	1,899	319	27,733	5,640	44,757	235,668	38,691
1929	122,430	19,463	20,656	3,304	5,371	859	18,531	3,125	1,887	375	37,564	6,009	46,388	252,827	33,135
1930	89,013	20,077	19,664	4,469	5,247	1,193	18,354	4,412	1,863	339	18,304	4,160	43,715	196,160	34,650
1931	38,973	18,745	13,285	6,446	4,065	1,972	13,519	6,839	1,828	344	2,587	1,256	35,987	110,244	35,602
1932	8,980	13,578	5,202	7,974	2,119	3,248	6,354	10,198	1,797	382	.....	.....	27,180	51,632	35,380
Avg. 10 Yrs. 1923–32 incl	89,582	19,734	17,151	4,432	4,682	1,316	14,661	4,284	1,330	261	11,446	2,287	42,374	181,226	32,314
1933	14,945	6,662	9,175	4,099	3,561	1,591	9,351	4,423	1,735	416	.....	.....	36,840	75,607	17,191
1934	20,727	8,096	10,710	4,200	3,827	1,501	9,932	4,090	1,635	451	.....	.....	38,428	85,259	18,338
1935	17,429	9,589	9,559	5,272	3,329	1,837	Est. 8,900	Est. 5,000	1,455	567	.....	.....	34,362	75,034	22,265
Avg. 5 Yrs. 1931–35 incl	20,211	11,334	9,586	5,598	3,380	2,030	9,611	6,110	1,600	432	518	251	34,559	79,555	25,755

* Excludes E. & L. S. proportion of Wells Yard maintenance expenses, the use of which is practically 100% with the E. & L. S.

6040

[fol. 494]

EXHIBIT No. F-7

Witness Doyne

Iron Ore Tonnage in Proposed Pooling Plan

Involved in Foreign Line Haul

(Tonnage Statistics from Exhibits 25–30 Incl.)

Milwaukee Traffic

Iron River District

Year	Tons	Ton Miles: Present Foreign Haul 64.0 M.	Ton Miles: Proposed Foreign Haul 90.4 M.
1929	1,036,521	66,337,344	93,701,498
1930	489,582	31,333,248	44,258,213
1931	356,005	22,784,320	32,182,852
1932	72,177	4,619,328	6,524,801
1933	307,500	19,680,000	27,798,000
1934	189,077	12,100,928	17,092,561
Total	2,450,862	156,855,168	221,557,925
Yearly Average	408,477	26,142,528	36,926,321

Crystal Falls District

Year	Tons	Ton Miles: Present Foreign Haul 64.0 M.	Ton Miles: Proposed Foreign Haul 80.2 M.
1929	376,116	24,071,424	30,164,503
1930	180,799	11,571,136	14,500,080
1931	63,836	4,085,504	5,119,647
1932	53,151	3,401,664	4,262,710
1933	99,423	6,363,072	7,973,725
1934	99,467	6,365,888	7,977,253
Total	872,792	55,858,688	69,997,918
Yearly Average	145,465	9,309,781	11,666,320

[fol. 495]

Amasa District

Year	Tons	Ton Miles: Present Foreign Haul 64.0 M.	Ton Miles: Proposed Foreign Haul 52.6 M.
1929	176,495	11,295,680	9,283,637
1930	177,139	11,336,896	9,317,511
1931	79,238	5,071,232	4,167,919
1932	.....	.....	.....
1933	97,013	6,208,832	5,102,884
1934	113,798	7,283,072	5,985,775
Total	643,683	41,195,712	33,857,726
Yearly Average	107,280	6,865,952	5,642,954

Exhibit No. F-7—Continued

North Western Traffic

Amasa District

Year	Tons	Ton Miles: Present Foreign Haul 0.0 M.	Ton Miles: Proposed Foreign Haul 44.3 M.
1929	.....	.....	.....
1930	.....	.....	.....
1931	.....	.....	.....
1932	.....	.....	.....
1933	.....	.....	.....
1934	.....	.....	.....
Total	.....	.....	.....
Yearly Average	.....	.....	.....

[fol. 496]

Summary—Ton Miles Foreign Haul 1929-1934

	Present	Proposed	Excess Over Present
Iron River Dist.	156,855,168	221,557,925	64,702,757
Crystal Falls Dist.	55,858,688	69,997,918	14,139,230
Amasa Dist.	41,195,712	33,857,726	—7,337,986
Total	253,909,568	325,413,569	71,504,001
Yearly Average	42,318,261	54,235,595	11,917,338

[fol. 497] Exhibit No. F-8

Docket No. 26903. Witness Heintz. Exhibit No. 16A

Escanaba and Lake Superior Railroad Company

Operating Accounts Affected by Joint Facility Credits

Account	Gross Expenses	Joint Facility Credit (C. M. St. P. & P.)	Net Expenses (borne by E. & L. S. R. R.)
1923			
Maintenance of Way & Structures	$217,375.26	$83,907.41	$133,467.85
Transportation Expenses	152,350.15	18,140.94	134,209.21
General Expenses	45,686.08	5,186.76	40,499.32
	$415,411.49	$107,235.11	$308,176.38
1924			
Maintenance of Way & Structures	$212,380.74	$97,190.33	$115,190.41
Transportation Expenses	142,554.10	16,238.27	126,315.83
General Expenses	33,540.38	4,349.68	29,190.70
	$388,475.22	$117,778.28	$270,696.94
1925			
Maintenance of Way & Structures	$170,214.71	$95,391.87	$74,822.84
Transportation Expenses	145,677.54	18,301.61	127,375.93
General Expenses	27,366.50	4,922.22	22,444.28
	$343,258.75	$118,615.70	$224,643.05
1926			
Maintenance of Way & Structures	$181,174.86	$101,585.54	$79,589.32
Transportation Expenses	148,482.95	20,374.64	128,108.31
General Expenses	30,976.78	5,210.00	25,766.78
	$360,634.59	$127,170.18	$233,464.41

[fol. 498] EXHIBIT No. F-9

Escanaba and Lake Superior Railroad Company

Comparative Income Statement for Year 1935

I. Operating Income:	
Railway Operating Revenues	$260,150.87
Railway Operating Expenses	191,095.16
Net Revenue from Ry. Operations	$69,055.71
Railway Tax Accruals	33,472.34
Railway Operating Income	35,583.37
Total Operating Income	35,583.37
II. Non-Operating Income:	
Rent from Locomotives	247.89
Rent from Work Equipment	29.40
Joint Facility—Rent Income	44,483.54
Miscellaneous Rent Income	1,230.00
Income from Funded Securities	669.03
Income from Unfunded Securities & Accounts	1,223.17
Miscellaneous Income	139.17
Total Non-Operating Income	48,022.20
Gross Income	83,605.57
III. Deductions from Gross Income:	
Hire of Freight Cars	14,073.05
Rent of Passenger Cars	8.00
Joint Facility Rents	180.00
Miscellaneous Rents	117.99
Interest on Unfunded Debt	8.09
Total Deductions from Gross Income	14,387.13
Net Income	69,218.44
E. & L. S. Joint Wheelage	505,845
C. M. St. P. & P. Joint Wheelage	917,046
C. M. St. P. & P. Percentage	64.45

[fol. 499] EXHIBIT No. F-10

Escanaba and Lake Superior Railroad Company

Detailed Statement of Income Account No. 501, Railway Operating Revenues for year ended December 31, 1935, by Primary Accounts

Class of Railway Operating Revenues	
Freight Revenue	$241,553.65
Passenger Revenue	803.74
Mail Revenue	5,493.20
Express Revenue	185.61
Milk Revenue	9.66
Switching Revenue	6,388.31
Demurrage Revenue	1,042.00
Telegraph & Telephone Revenue	447.40
Rent of Buildings & Other Property	1,068.00
Miscellaneous Revenues	3,159.30
Total	$260,150.87

Detailed Statement of Income Account No. 531, Railway Operating Expenses for the year ended December 31, 1935, by General Accounts

Maintenance of Way & Structures	$29,485.51
Maintenance of Equipment	45,643.53
Traffic Expenses	2,997.53
Transportation Expenses	90,027.56
General Expenses	22,941.03
Total	$191,095.16

[fol. 500] EXHIBIT No. F-11

Escanaba and Lake Superior Railroad Company Analysis of Income Statement Adjusted to reflect C. M. St. P. & P. Joint Facilities Credits

	1935		
	As reported (Including C. M. St. P. & P. credits)	C. M. St. P. & P. Proportion	Excluding C. M. St. P. & P. Proportion
I. Operating Income:			
Ry. Operating Revenues	$260,150.87	.....	$260,150.87
Ry. Operating Expenses	191,095.16	$30,388.01	221,483.17
Net Rev. from Ry. Oper.	69,055.71	.....	38,667.70
Ry. Tax Accruals, Etc.*	33,472.34	.....	33,472.34
Ry. Operating Income	35,583.37	.....	5,195.36
II. Non-Operating Income	48,022.20	44,483.54	3,538.66
III. Ded. from Gross Income	14,387.13	.....	14,387.13
Net Income	69,218.44	74,871.55	5,653.11†

† Red Ink—deficit.

* Includes uncollectible railway revenue; also income tax accruals as originally stated, with no attempt of adjustment reflecting effect of C. M. St. P. & P. credits.

[fol. 501] EXHIBIT No. F-12

Escanaba and Lake Superior Railroad Company

Operating Accounts Affected by Joint Facility Credits

Year 1935

Account	Gross Expenses	Joint Facility Credit (C. M. St. P. & P.)	Net Expenses (borne by E. & L. S. R. R.)
Maintenance of Way & Structures	$46,985.46	$17,499.95	$29,485.51
Transportation Expenses	99,586.13	9,558.57	90,027.56
General Expenses	26,270.52	3,329.49	22,941.03
	$172,842.11	$30,388.01	$142,454.10

[fol. 502] EXHIBIT No. F-13

Commodities Transported by Escanaba and Lake Superior Railroad During Year Ended December 31, 1935

Products of Agriculture:	Number of Carloads
Grain and Grain Products	161
Potatoes	49
Other Products of Agriculture	22
Animals and Products	97
Products of Mines:	
Bituminous Coal	2087
Iron Ore	602
Other Products of Mines	473
Products of Forests:	
Logs	1954
Lumber Shingles & Lath	1439
Pulpwood	1636
Ties	78
Other Products of Forests	2630
Manufactures and Misc.	3530
Total Carload Traffic—Cars	14758

	Number of Tons
Total Carload Traffic—Tons	521,570
All L. C. L. Freight	2,292
Grand Total—All Traffic—Tons	523,862

[fol. 503]

EXHIBIT No. F-14

Tonnage Originated on
Escanaba and Lake Superior Railroad

(West of Groos, Mich.)

Year 1935.

Origin Station*	Number of Carloads		
	To Local Destinations	To Off-Line Destinations	Total
Gladstone Crossing	....	24	24
Lambert	....	5	5
Chandler	1	15	16
Grant Spur	3	3	6
Cornell	2	23	25
Woodlawn	17	41	58
Hendricks	19	73	92
Watson	114	123	237
Mashek	512	126	638
Reade	64	37	101
Northland	42	31	73
Ross and Kates	151	65	216
Alfred	67	27	94
Lindsley	....	2	2
Ralph	36	2	38
Henderson	14	..	14
Turner	57	..	57
Total Carloads	1099	597	1696

* And adjacent spurs or sidings.

[fol. 504]

EXHIBIT No. F-15

Classification of Tonnage Originated on
Escanaba and Lake Superior Railroad

(West of Groos, Mich.)

Year 1935

Commodities	Destined to Local Points		Destined to Off-Line Points	
	Cars	Tons	Cars	Tons
Potatoes	....	....	46	842
Sugar Beets	....	....	5	109
Hay & Grain	....	....	1	12
Machinery	....	....	1	11
Lumber	10	258	2	61
Logs	168	4925	....	....
Ties	....	....	49	1375
Posts & Poles	62	1252	71	1333
Mining Timbers	68	2901	134	5553
Other Forest Products	791	31480	288	7553
Total	1099	40816	597	16849
			1099	40816
Total Originated, west of Groos, Mich.			1696	57665

[fol. 505] EXHIBIT No. F-16

Escanaba and Lake Superior Railroad Company
Earnings on Traffic Moving Via C. M. St. P. & P. and C. & N. W.—1935

Month	C. M. St. P. & P.		C. & N. W.	
	Inbound	Outbound	Inbound	Outbound
January	$1,687.65	$4,365.48	$2,712.02	$2,320.36
February	1,836.64	3,590.64	3,550.14	2,506.49
March	2,047.10	4,710.25	3,602.30	3,128.81
April	2,280.73	3,191.14	3,302.26	3,086.87
May	2,206.03	3,544.46	2,962.90	2,696.62
June	2,286.22	3,510.58	3,425.92	3,695.95
July	2,603.14	2,627.40	2,377.07	3,539.91
August	2,441.26	3,057.72	2,229.48	2,156.91
September	2,311.74	3,086.81	2,122.09	2,771.00
October	2,707.97	4,543.61	2,398.14	3,566.47
November	2,303.64	2,940.86	2,501.72	2,879.84
December	1,933.15	4,069.84	3,111.38	2,032.30
Total	$26,645.27	$43,238.79	$34,295.42	$34,411.53
Grand Total	.....	$69,884.06	.....	$68,706.95

Above does not include adjustment nor inter-terminal switching.

[fol. 506] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

In Equity. No. 831

ESCANABA & LAKE SUPERIOR RAILROAD COMPANY, a Corporation, Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants, and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Intervening Defendants

Before Simons, Circuit Judge, and Moinet and Raymond, District Judges

OPINION

RAYMOND, District Judge:

Plaintiff seeks under the authority of 28 U. S. C. secs. 41 (par. 28), 45, 46 and 47, to enjoin an order and certificate of the Interstate Commerce Commission entered November 18, 1936. The Commission's report issued therewith is

found in 219 I. C. C. 285. That report and the findings of fact accompanying this opinion sufficiently state the rela- [fol. 507] tionship of the parties and the course of the litigation. Upon oral argument counsel agreed that the issues here for consideration are greatly restricted by the provisions of the Transportation Act of 1920 which introduced into federal legislation a new railroad policy and vested the Commission with extensive powers and discretion beyond the scope of review by the courts. (See New England Divisions Case, 261 U. S. 184, 189; Texas & Pacific Railway Co. v. Gulf, etc. Railway Co., 270 U. S. 266, 277; and Colorado v. United States, 271 U. S. 153, 162, 163.)

In general, the order and certificate complained of authorize the pooling of iron ore traffic from the Menominee Range to the docks at Escanaba, Michigan, the pooling of the revenues therefrom, the expenses thereof, and of the tracks, equipment, facilities and employees engaged in that traffic between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago & North Western Railway Company; the pooling by these two railroads of their earnings on class and commodity traffic interchanged between them and the plaintiff at Channing and Escanaba; and the abandonment by the Milwaukee road of its operations under trackage rights for transportation of iron ore [fol. 508] over the line of plaintiff's railway from Channing, Michigan, to Escanaba.

Plaintiff urges that the record contains no substantial testimony tending to prove that competition will not be unduly restrained by the pooling of traffic in iron ore; that there is no evidence to support findings sustaining the pooling of class or commodity traffic; that there is no substantial evidence warranting the commission's finding that public convenience and necessity permit abandonment of the operation by the Milwaukee road of plaintiff's railway line from Channing to Escanaba under the agreement for trackage rights, and argues that the overwhelming preponderance of the evidence is that the direct probable results of such abandonment will be serious injury and detriment to the public. Plaintiff also insists that the Commission's jurisdiction to authorize the pooling of freight by railroad is expressly limited by the requirement of paragraph 1 of sec. 5 of the act that division of traffic or earnings shall be assented to by all the carriers involved; that it is a carrier involved, and that its assent has not been given.

The binding effect of fact findings by the Commission and the limitations upon the power of the courts to disturb them [fol. 509] have been so frequently noted that restatement is not required. See Pittsburgh & W. V. Railway Co. v. United States, 41 F. (2d) 806, 808. It is clear that courts may not consider the weight of the evidence or the wisdom of the order made provided there is evidence to sustain it. The courts accord to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience". (See Illinois Central Railroad Co., et al. v. Interstate Commerce Commission, 206 U. S. 441.) In the instant case, the Commission found that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the pooling agreement; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable. Examination of the record is convincing that there is substantial evidence to support these findings. It is true that the applicants did not upon some issues produce all of the available evidence; that some of the evidence was of the kind commonly designated as opinion or expert evidence given by employees of some of *of* [fol. 510] the interested parties; and that other evidence was indirect or circumstantial. But these considerations do not warrant its rejection in determining whether or not there was more than a mere scintilla of evidence before the Commission. Such evidence is commonly accepted as convincing even in criminal trials. Against the admitted loss and inconvenience to the communities along the line of plaintiff's railroad, the Commission was charged with the responsibility of weighing the loss and inconvenience to the larger general public—national in scope. Under repeated decisions, we have no right to weigh this evidence to determine whether our conclusions thereon would differ from those of the Commission.

It is important to observe that the abandonment authorized by the Commission does not relate to usual and ordinary railroad operations. It is limited to the discontinuance of operations by the Milwaukee Railroad under a contract for trackage rights relating principally to the trans-

portation of iron ore. Continuance by plaintiff of operation by the railroad is in no way limited. The trackage contract confers only a privilege. It does not obligate the Milwaukee to make any use of plaintiff's track. The pooling arrangement approved by the Commission enables the [fol. 511] Milwaukee to effect substantial economies which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually. Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right.

Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the interchange of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that plaintiff is not a carrier of the ore traffic. We [fol. 512] must hold that under the contract the Milwaukee as lessee of trackage rights is the sole carrier of this traffic. Other traffic interchanged at Channing with the Milwaukee is not disturbed by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the consequences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway.

The conclusion of the court is that the certificate and order complained of find adequate support in the record and that the prayer of the petition filed herein should be denied. An order will be entered accordingly.

[fol. 513] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. Plaintiff is a railroad company incorporated under the laws of Michigan and is engaged in the interstate transportation of freight and passengers. It owns and operates a line of railway from Escanaba, Michigan, where it connects with the Chicago & North Western Railway and extends in a northwesterly direction for a distance of approximately sixty-three miles to Channing, Michigan, where it connects [fol. 514] with the Chicago, Milwaukee, St. Paul & Pacific Railroad. It is a common carrier subject to the provisions of the Interstate Commerce Act.

2. The defendants are the United States of America and the Interstate Commerce Commission. The trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company were permitted to intervene as defendants.

3. On March 12, 1935, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Chicago & North Western Railway Company and a non-operating subsidiary of the latter known as Escanaba, Iron Mountain & Western Railroad Company filed application with the Interstate Commerce Commission under which they sought an order under paragraph 1 of sec. 5 of the Interstate Commerce Act authorizing applicants to pool ore traffic and divide the earnings therefrom, moving from the Menominee Range in Michigan and Wisconsin to the docks at Escanaba, as provided for in an agreement between the three parties, a copy of which was attached to said application. The agreement also provided for the pooling of certain substantial traffic other than iron ore from the Menominee Range, namely all class and commodity traffic interchanged by the applicants with the plain- [fol. 515] tiff, as described, the substance of the agreement being as follows:

"52. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Rail-

road if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is, therefore, agreed that from the effective date of this contract the revenues of the two companies from all business interchanged with the Escanaba and Lake Superior shall be pooled on the following basis:"

4. Subsequently, by appropriate petitions and orders, the trustees, appointed by the United States court at Chicago in proceedings under 77 B of the Bankruptcy Act, of both the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company joined in the aforesaid application.

5. The aforesaid application was denied in a report (210 I. C. C. 599) and an order was entered September 24, 1935, without prejudice to a renewal if and when the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should procure from the Commission a certificate of convenience and necessity under paragraph (18) of Section 1 of the Act for the abandonment of certain operations, as contemplated by the aforesaid pooling plan.

[fol. 516] 6. The Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed with the Commission on November 29, 1935, a contingent application under paragraph (18) of Section 1 for a certificate of public convenience and necessity, in substance seeking permission for abandonment of operation, under trackage rights, over the line owned by the Escanaba and Lake Superior Railroad Company between Channing and Escanaba, Michigan, and for an order authorizing pooled use and operations of certain tracks and facilities in Michigan and Wisconsin, as more fully set forth in its application, which was docketed as Finance Docket No. 11025. The abandonment request was contingent upon favorable action on the pooling proposition. Thereafter, the aforesaid trustees of the property joined in said application.

7. Plaintiff Escanaba and Lake Superior Railroad Company did not assent to the aforesaid pooling arrangements. It intervened in the aforesaid proceedings and presented evidence in opposition to both applications. The Escanaba Chamber of Commerce and other organizations and repre-

sentatives of the communities in the territory affected intervened and offered testimony in opposition to both applications.

[fol. 517] 8. On November 18, 1936, an order was made and entered by the Interstate Commerce Commission approving and authorizing the pooling by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees, and the Chicago & North Western Railway Company, Charles P. Megan, Trustee, and the Escanaba, Iron Mountain & Western Railroad Company (a wholly owned and controlled subsidiary of the Chicago & North Western Railway) of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Michigan, for transshipment beyond, and of certain class and commodity traffic, and for division of earnings thereon, on terms and conditions set forth in the contract referred to in the Commission's report. On the same date, the Commission made and entered a certificate of public convenience and necessity in a proceeding entitled Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment of Operation, certifying that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights, over the plaintiff's line of rail-[fol. 518] road between Channing and Escanaba, Michigan, in Dickinson, Marquette and Delta Counties, Michigan.

9. On December 22, 1936, plaintiff brought this suit to set aside the order and certificate of November 18, 1936. Answer was duly filed by the defendants and intervening defendants and hearing upon said petition was held at Grand Rapids, Michigan, January 22, 1937, before this court constituted of three judges, it having been stipulated that said hearing might be held at Grand Rapids, Michigan, in the Southern Division, instead of in the Northern Division. At said hearing there was introduced a certified copy of the evidence introduced before the Commission at the hearings held by it in the aforesaid proceedings, also certified copies of certain other portions of the Commission's record in said proceedings.

10. The record before the Commission and before the court shows that the plaintiff company was incorporated February 12, 1900. The first section of its railway, comprising the southern 31 miles from Escanaba as far as Watson, was constructed previous to 1900, primarily as a logging railroad. The western 32 miles from Watson to Channing was constructed in 1900, primarily for the transportation [fol. 519] of iron ore and under a contract of the plaintiff with the Chicago, Milwaukee & St. Paul Railroad Company for a term of twenty years, expiring December 31, 1920. Plaintiff's entire line was made of a much heavier type than would have been necessary for logging engines and trains, and with no grades or sharp curves, for the sake of the iron ore traffic. A new contract was executed between the Milwaukee road and the plaintiff upon expiration of the original contract and will expire January 1, 1951. The agreement of 1900 was made at a time when the Milwaukee Railroad foresaw and was providing for a large increase in the iron ore traffic from the Menominee Range. It had previously handled that traffic by a route southbound over its main line through Channing down to Pembine, Wisconsin, thence over the Soo Line to the latter carrier's docks at Gladstone, Michigan.

11. Since the year 1900, the Milwaukee Railroad has run its ore trains from Menominee Range via Channing over the line of railway owned and maintained by plaintiff and to docks at Escanaba owned by the Milwaukee road, for transshipment via lake vessels. The tariffs of freight rates under which this ore has moved are tariffs of the Milwaukee Railroad. The engines and cars are owned and the train crews are employed by the Milwaukee road. The plaintiff is les- [fol. 520] sor of the tracks from Channing to Escanaba, it maintains the tracks, under a high standard of maintenance, and it dispatches the movements of the ore trains.

12. The Chicago & North Western Railway also has been a very large carrier of iron ore for many years past from the Menominee Range to Escanaba which moves over its line of railroad to Iron Mountain, Michigan, and thence eastward over a line owned by Escanaba, Iron Mountain and Western Railroad, which is a wholly owned non-operating subsidiary of the North Western, to ore docks owned and operated by the North Western at Escanaba.

13. The ore docks of the Milwaukee road at Escanaba became seriously out of repair in 1932 and since that time that road has been making use of the North Western ore docks. Thereupon, the officials of the two roads made a private study, which was completed in 1932, of the feasibility of a plan of pooling the ore traffic. This resulted in the execution of the pooling agreement aforesaid, and the application to the Commission.

14. The plaintiff also interchanges with each of the applicant railroads a large volume of general traffic which moves over through routes and under joint rates of the plaintiff [fol. 521] with each such applicant. The agreement between the applicants, as approved by the Commission, provides for the pooling of all earnings of this joint traffic. There is no pooling of the traffic itself or of the facilities used in moving the traffic. There is nothing in this portion of the pooling plan which interferes with the interchange, routing or division of earnings allocated to plaintiff or with the rates on the traffic so interchanged. By the application to the respective roads of thirty per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with plaintiff, and competition between the Milwaukee Railroad and the North Western Railway on traffic originating and terminating on the line of plaintiff is thereby preserved.

Conclusions of Law

1. The Commission's findings and conclusions, as set forth in its reports of September 24, 1935, and November 18, 1936, are supported by substantial evidence.

2. The Commission's order of November 18, 1936, is within its authority, under section 5(1) of the Interstate Commerce Act. Plaintiff is not a carrier involved in the pooling arrangement approved by said order. The carriers involved in said pooling arrangement are the carriers [fol. 522] whose traffic and earnings are to be pooled and who are parties to the pooling agreement. None of plaintiff's traffic and none of its earnings are to be pooled, and it is not a party to the pooling agreement. Therefore, its assent to the pooling, which is wholly between the Milwaukee

and the North Western, is not necessary under section 5(1) of the Act.

3. There is nothing before the court to indicate that the pooling of earnings as between the Milwaukee and the North Western on class and commodity traffic will result in violations of section 3(3) of the Interstate Commerce Act to the injury of plaintiff. Nor is there anything before the court to indicate that complaint of such alleged violations has been submitted to or passed upon by the Commission either in the aforesaid proceedings or otherwise.

4. The Commission's certificate that public convenience and necessity permit the abandonment by the Milwaukee of operation under trackage rights over plaintiff's line between Channing and Escanaba is within its authority under section 1 (18), (19) and (20) of the Interstate Commerce Act.

5. Said certificate and said order approving the pooling arrangement were made after full hearing and are fully supported by the evidence. In making them the Commission committed no error of law, and both are valid.

6. An order will be entered denying the prayer of the [fol. 523] petition filed herein.

[fol. 524] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

In Equity. No. 831

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, a Corporation, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Intervening Defendants

FINAL DECREE

The above-entitled cause came on for final hearing before the special Court of three judges, duly convened pursuant

to Urgent Deficiencies Act, 38 Stat. L. 219, and was argued by counsel, and, upon consideration thereof, it is:

Ordered, Adjudged and Decreed, That the plaintiff's complaint be, and it is hereby dismissed for want of equity, at plaintiff's costs.

This 23rd day of March, 1937.

Charles C. Simons, United States Circuit Judge.
Edward J. Moinet, United States District Judge.
Fred M. Raymond, United States District Judge.

[fol. 525] Approved as to form:

Elmer B. Collins, P., Special Assistant to the Attorney General of the United States. J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission.

[fol. 526] In United States District Court

[Title omitted]

Notice of Appeal

To The Attorney General of the United States, The Interstate Commerce Commission, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Intervening Defendants:

Please Take Notice that, pursuant to the statutes and rules of court in such case made and provided, Escanaba and Lake Superior Railroad Company, plaintiff in the above entitled cause, does hereby appeal to the Supreme Court of the United States from the final decree of the District Court made and entered on the 23rd day of March, 1937, dismissing plaintiff's complaint in the above entitled cause.

April 28, 1937.

John S. Burchmore, Clark M. Robertson, Solicitors for Escanaba and Lake Superior Railroad Company.

Service of the foregoing notice of appeal and the receipt of a copy thereof, together with a copy of plaintiff's peti-

tion for appeal and a copy of plaintiff's assignment of errors, are hereby acknowledged this 28th day of April, 1937.

Elmer B. Collins, for the Attorney General. J. Stanley Payne, Counsel for Interstate Commerce Commission. C. R. Sutherland, Solicitor for Henry A. Sandrett, Walter J. Cummings and George I. Haight, Trustees, Etc.

[fol. 527] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

To The Attorney General of the State of Michigan, Lansing, Michigan:

In accordance with the provisions of title 28 U. S. C. A. Section 47A (Judicial Code, Section 210) you are hereby notified that, pursuant to the statutes and rules of court in such case made and provided, Escanaba and Lake Superior Railroad Company, a corporation, plaintiff in the above entitled cause, has appealed to the Supreme Court of the United States from the final decree of the District Court entered on the 23rd day of March, 1937, in favor of the defendants and dismissing plaintiff's petition and denying to it the relief therein sought.

Dated May 4, 1937.

John S. Burchmore, Clarke M. Robertson, Solicitors for Escanaba and Lake Superior Railroad Company.

[fol. 528] Admission of Service

Service is hereby admitted of the within and foregoing notice and receipt of a copy thereof is hereby acknowledged on the — day of April, 1937.

Raymond W. Starr, Attorney General for the State of Michigan, by Samuel B. Ostrow, Chief Asst.

[fol. 529] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Escanaba and Lake Superior Railroad Company, plaintiff in the above entitled cause, feeling itself aggrieved by the final decree entered in said cause by this Court March 23, 1937, prays an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said plaintiff considers the decree erroneous are set forth in the assignment of errors accompanying this petition and to which reference is hereby made.

Said plaintiff prays that a transcript of record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated May 3, 1937.

Clark M. Robertson, John S. Burchmore, Solicitors for Escanaba and Lake Superior Railroad Company, Plaintiff.

[fol. 530] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Escanaba and Lake Superior Railroad Company, plaintiff in the above entitled cause, now comes and files the following assignment of errors in connection with its petition for an appeal from the final decree entered by this Court on March 23, 1937 in said cause:

The District Court erred:

1. In entering the decree dismissing plaintiff's complaint for want of equity.

2. In failing and refusing to enjoin, set aside and annul the order and certificate of the Interstate Commerce Commission entered November 18, 1936, in substance approving and authorizing the pooling by Chicago, Milwaukee, St.

Paul and Pacific Railroad Company (Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees), and the Chicago and North Western Railway Company, (Charles P. Megan, Trustee), of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined [fol. 531] to Escanaba, Michigan, and of certain class and commodity traffic, and for division of earnings thereon and in failing and refusing to set aside and annul also the certificate of the Commission made and entered the same date and entitled in Finance Docket No. 11025, certifying that the present and future public convenience and necessity permit the abandonment by said Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation under trackage rights over Escanaba and Lake Superior Railroad between Channing and Escanaba, Michigan.

3. In concluding as a matter of law that said Commission's aforesaid order of November 18, 1936 is within its authority under Section 5 (1) of the Interstate Commerce Act; that plaintiff is not a carrier involved in the pooling arrangement approved by said order; that the carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement; that none of plaintiff's traffic and none of its earnings are to be pooled and it is not a party to the pooling agreement; that, therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under Section 5 (1) of the Act.

4. In finding and concluding as a matter of law that the Commission's aforesaid certificate that public convenience and necessity permit the abandonment by the Milwaukee of operation under trackage rights over plaintiff's line between Channing and Escanaba is within its authority under Section 1 (18), (19) and (20) of the Interstate Commerce Act.

5. In holding and concluding as a matter of law that in making said certificate and said order approving the pooling arrangement, the Commission committed no error of law, and both are valid.

[fol. 532] 6. In entering its finding of fact, correctly stating that plaintiff also interchanges with each of the appli-

cant railroads a large volume of general traffic which moves over through routes and under joint rates of the plaintiff with each such applicant and that the agreement between the applicants, as approved by the Commission, provides for the pooling of earnings of this joint traffic, and thereon erroneously finding and concluding that there is no pooling of the traffic itself or of the facilities used in moving the traffic; there is nothing in this portion of the pooling plan which interferes with the interchange, routing or division of earnings allocated to plaintiff or with the rates on the traffic so interchanged; by the application to the respective roads of thirty per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with plaintiff, and competition between the Milwaukee Railroad and the North Western Railway on traffic originating and terminating on the line of plaintiff is thereby preserved.

7. In concluding as a matter of law that the Commission's findings and conclusions, as set forth in its reports of September 24, 1935 and November 18, 1936, are supported by substantial evidence.

John S. Burchmore, Clark M. Robertson, Solicitors for Escanaba and Lake Superior Railroad Company, Plaintiff.

[fol. 533] IN UNITED STATES DISTRICT COURT

In Equity. No. 831.

[Title omitted]

ORDER ALLOWING APPEAL

Plaintiff, having filed its petition for appeal herein, same is hereby granted and the plaintiff is hereby allowed to appeal said case, and

It Is Ordered, that said appeal be and the same is hereby entered to the Supreme Court of the United States upon the filing of a bond by the said plaintiff in the sum of Five Hundred ($500) with good and sufficient surety to be approved by this Court, conditioned upon said plaintiff prosecuting its appeal to effect, and answering all costs if it fail to make its appeal good.

Dated this 3rd day of May, 1937.

Fred M. Raymond, United States District Judge.

[fols. 534-535] Citation, in usual form, showing service on Elmer B. Collins et al., omitted in printing.

[fols. 536-538] Bond on Appeal for $500.00, approved, omitted in printing.

[fol. 539] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Entitled Court:

Please prepare a Transcript of the Record in the above entitled cause in the matter of the appeal therein and include in said transcript in the order given below the following matter, viz:

1. Petition or Bill of Complaint and Appendix 1 thereto filed by plaintiff December 22, 1936.
2. Petition of Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for leave to intervene.
3. Answer of United States of America.
4. Answer of Interstate Commerce Commission.
5. Answer of Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendants.
6. Original certified copy of application to the Interstate Commerce Commission, filed March 12, 1935, for the ap-[fol. 540] proval of a contract between Chicago and North Western Railway Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company offered as an exhibit at the hearing before the Court on January 22, 1937.
7. Original certified copy of application before the Interstate Commerce Commission, filed November 20, 1935, for a certificate of public convenience and necessity for abandonment of operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company over the line of the Escanaba

and Lake Superior Railroad Company, offered as an exhibit at the hearing before the Court on January 22, 1937.

8. Original certified copy of a petition for leave to intervene filed March 30, 1935 by the Escanaba and Lake Superior Railroad Company in proceedings before the Interstate Commerce Commission, offered as an exhibit at the hearing before the Court on January 22, 1937.

9. Original certified copy of petition for leave to intervene filed December 20, 1935 by Escanaba Chamber of Commerce in the proceedings before the Interstate Commerce Commission and offered as an exhibit at the hearing before the Court on January 22, 1937.

10. Narrative abstract of the record of testimony before the Interstate Commerce Commission, agreed upon by counsel and approved by the Court. (Stipulation and order attached.)

11. Original certified copies of exhibits offered in proceedings before the Interstate Commerce Commission and offered as an exhibit at the hearing before the Court on January 22, 1937.

12. Written Opinion of Court.

13. Findings of Fact and Conclusions of Law entered by the Court.

14. Final Decree entered March 23, 1937.

15. Plaintiff's Notice of Appeal addressed to Attorney General of United States, Interstate Commerce Commission and Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, together with admission of Service thereon.

[fol. 541] 16. Notice of Appeal addressed to Attorney General of the State of Michigan together with Admission of Service thereon.

17. Plaintiff's Petition for Appeal.

18. Plaintiff's Assignment of Errors.

19. Order Allowing Appeal dated May 3, 1937.

20. Original Citation on Appeal together with Admission of Service thereon, dated and issued May 3, 1937.

21. Bond on Appeal.

22. Plaintiff's Statement as to Jurisdiction on Appeal.

23. Notice Pursuant to paragraph 2, Rule 12, of Rules of the Supreme Court of the United States.

24. Admission of Service of Order Allowing Appeal, etc.

25. This Præcipe for Transcript of Record.
26. Order enlarging time within which to file Præcipe and Docket the case in the Supreme Court.
27. Order further enlarging time.
28. Clerk's certificate.

John S. Burchmore, Clark M. Robertson, Solicitors for Escanaba and Lake Superior Railroad Company.

Appellees, by their counsel, consent to the preparation and transmittal of the record in accordance with the foregoing præcipe and waive their right to file a counter præcipe.

Elmer B. Collins, for the Attorney General. J. Stanley Payne, Counsel for Interstate Commerce Commission. C. R. Sutherland, Solicitor for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 542] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

On motion of counsel for plaintiff and good cause having been shown,

It is ordered, That the time for approving the narrative statement of evidence and filing of præcipe for record be, and it is hereby, enlarged to August 16, 1937, and that the time for filing the record and docketing the appeal in the above-entitled cause in the Supreme Court of the United States be and the same is hereby, extended to and including September 16, 1937.

Fred M. Raymond, U. S. District Judge.

Dated June 5, 1937.

Consented to:

Elmer B. Collins, For the United States. J. Stanley Payne, For the Interstate Commerce Commission. C. R. Sutherland, For trustees of Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

[fol. 543] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR EXTENSION OF TIME FOR APPROVING NARRATIVE STATEMENT OF EVIDENCE AND FILING OF PRÆCIPE

Now comes the plaintiff above named and represents to the court that the order allowing the appeal herein to the Supreme Court of the United States was entered May 3, 1937; that by order entered the 5th day of June, 1937, for good cause shown and under stipulation of counsel, the time for approving the narrative statement of evidence and filing of praecipe for record was enlarged to August 16, 1937, and the time for filing the record and docketing the appeal in the Supreme Court was extended to and including September 16, 1937; that counsel for plaintiff prepared draft of narrative statement of the evidence and draft of praecipe which were submitted to counsel for all defendants on or prior to the 23rd day of July, 1937; that counsel for defendants require more time for completing their check of the narrative statement and submission of corrections therein; that the parties desire to agree upon a narrative statement for approval by the court, and to that end both sides desire a further extension of time to be granted by the court; and that to this motion counsel for all defendants have verbally authorized their consent;

Wherefore, plaintiff prays that the time for approving the narrative statement of evidence and filing of praecipe for record shall be enlarged to and including September 7, 1937.

Dated August 10, 1937.

John S. Burchmore, Solicitors for Plaintiff.

[fol. 544] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME

On the foregoing motion of counsel for plaintiff and good cause having been shown;

It is ordered, that the time for approving the narrative statement of evidence and filing of praecipe for record be and it is hereby enlarged to and including September 7, 1937.

Dated August 11, 1937.

Fred M. Raymond, United States District Judge.

[fol. 545] Clerk's certificate to foregoing transcript omitted in printing.

[fol.546] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE RECORD TO BE PRINTED—Filed September 17, 1937

I

Escanaba and Lake Superior Railroad Company, appellant, will rely upon the following points in brief and oral argument before this Court on its appeal in the above entitled cause:

The District Court erred:

1. In entering the decree dismissing plaintiff's complaint for want of equity.

2. In failing and refusing to enjoin, set aside and annul the order and certificate of the Interstate Commerce Commission entered November 18, 1936, in substance approving and authorizing the pooling by Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Chicago and North Western Railway Company, (and their respective Trustees), of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Michigan, and of certain class and commodity traffic, and for division of earnings thereon and in failing and refusing to set aside and annul also the certificate of the Commission made and entered the same date and entitled in Finance Docket No. 11025, certifying that the present and future public convenience and necessity permit the abandonment by the Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation under trackage rights over Escanaba and Lake Superior Railroad between Channing and Escanaba, Michigan.

[fol. 547] 3. In concluding as a matter of law that said Commission's aforesaid order of November 18, 1936 is within its authority under Section 5 (1) of the Interstate Commerce Act; that plaintiff is not a carrier involved in the pooling arrangement approved by said order; that the carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are

parties to the pooling agreement; that none of plaintiff's traffic and none of its earnings are to be pooled and it is not a party to the pooling agreement; that, therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under Section 5 (1) of the Act.

4. In finding and concluding as a matter of law that the Commission's aforesaid certificate that public convenience and necessity permit the abandonment by the Milwaukee of operation under trackage rights over plaintiff's line between Channing and Escanaba is within its authority under Section 1 (18), (19) and (20) of the Interstate Commerce Act.

5. In holding and concluding as a matter of law that in making said certificate and said order approving the pooling arrangement, the Commission committed no error of law, and both are valid.

6. In entering its finding of fact, correctly stating that plaintiff also interchanges with each of the applicant railroads a large volume of general traffic which moves over through routes and under joint rates of the plaintiff with each such applicant and that the agreement between the applicants, as approved by the Commission, provides for the pooling of earnings of this joint traffic, and thereon erroneously finding and concluding that there is no pooling of the traffic itself or of the facilities used in moving the traffic; there is nothing in this portion of the pooling plan which interferes with the interchange, routing or division of earnings allocated to plaintiff or with the rates on the traffic so interchanged; by the application to the respective roads of thirty per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure [fol. 548] in interchange with plaintiff, and competition between the Milwaukee Railroad and the North Western Railway on traffic originating and terminating on the line of plaintiff is thereby preserved.

II

Appellant further states that the entire record in this cause as filed in this Court, is necessary for consideration of the foregoing points, and that the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court excepting those

parts specified in "stipulation re printing record" filed in this Court.

John S. Burchmore, Solicitors for Escanaba and Lake Superior Railroad Company.

[fols. 549-550] Acknowledgment of Service.

Service of a copy of the above and foregoing appellant's statement of points to be relied upon and designation of the record to be printed, is acknowledged on behalf of all defendants this 17th day of September, 1937.

—— ——, Special Assistant to the Attorney General. J. Stanley Payne, Counsel for Interstate Commerce Commission.

[fol. 551] [File endorsement omitted.]

[fol. 552] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD AND EXHIBITS—Filed September 17, 1937

It is stipulated by the parties hereto that the following shall govern the printing of the record of the District Court in the appeal in the above-entitled cause:

Omit from printing the following exhibits introduced before the Interstate Commerce Commission in the hearing in Dockets No. 26903 and F. D. No. 11025:

Exhibits Nos. 4, 9, and 31.

Exhibit No. F-2, with the explanation:

"Omitted from printing because it is a duplicate of Exhibit No. 2."

Exhibit No. F-3, with the explanation:

"Omitted from printing because it is a duplicate of Exhibit No. 3."

With the above exceptions the entire record now on file shall be printed in the customary manner.

It is further agreed that this stipulation shall be printed by the Clerk as part of the record on appeal.

John S. Burchmore, Solicitors for Escanaba and Lake Superior Railroad Company. Elmer B. Col-
[fol. 553] lins, Special Assistant to the Attorney General. P. J. Stanley Payne, Counsel for Interstate Commerce Commission. C. R. Sutherland, Counsel for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 554] [File endorsement omitted.]

Endorsed on cover: File No. 41,896. W. Michigan, D. C. U. S. Term No. 415. Escanaba and Lake Superior Railroad Company, Appellant, vs. The United States of America, Interstate Commerce Commission, Henry A. Scandrett et al. Filed September 15, 1937. Term No. 415, O. T., 1937.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

IN EQUITY.

No. 831

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, A CORPORATION,

vs. *Plaintiff,*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

AND *Defendants,*

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Intervening Defendants.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant in support of jurisdiction of the Supreme Court of the United States to review the above entitled

case on appeal and in compliance with Rule 12 of the Rules of the Supreme Court, respectfully represents:

(A) Statutory Provisions Sustaining Jurisdiction.

It is provided in Section 47 of Title 28, United States Code (Chapter 32, 38 Stat. L. 220), that an action may be brought to set aside, in whole or in part, any order made or entered by the Interstate Commerce Commission by petition to any District Court of the United States, and that the judge of such District Court shall immediately call to his assistance to hear and determine the matter two other judges, one of whom shall be a Circuit Judge. This section also provides that an appeal may be taken direct to the Supreme Court of the United States.

Section 47a of Title 28, United States Code (Judicial Code, Section 210, Chapter 32, 38 Stat. L. 220), provides as follows:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

It is also provided in Section 345 of Title 28, United States Code (Judicial Code, Section 238, Amended, Chapter 426, 48 Stat. L. 926), that a direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had in certain classes of cases, including:

> "suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

(B) Decree.

The decree sought to be reviewed herein was entered March 23, 1937.

The petition for appeal was filed and the order allowing the appeal was entered May 3, 1937.

(C) Nature of the Case and Ruling of the District Court.

This suit was brought by the appellant Escanaba and Lake Superior Railroad Company, under authority of an Act of Congress approved October 22, 1913, 38 Stat. L. 219 (28 U. S. C. A., Sec. 41, Subsections 45, 46, 47), for the purpose of suspending, enjoining, setting aside and annulling a certain order of the Interstate Commerce Commission issued by that body on the 18th of November, 1936, in a proceeding before it known as No. 26903, and also for the purpose of enjoining, setting aside and annulling a certain certificate, issued by said Interstate Commerce Commission on the same date in a proceeding before it known as Finance Docket No. 11025. Very briefly, said order and certificate authorized the pooling of iron-ore traffic from the Menominee Range to the docks at Escanaba, Michigan, the pooling of the revennes therefrom, the expenses thereof, and of the tracks, equipment, facilities and employees engaged in that traffic between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago & North Western Railway Company; the pooling by these two railroads of their earnings on class and commodity traffic interchanged between them and plaintiff Escanaba and Lake Superior Railroad Company at Channing and Escanaba, Michigan; and the abandonment by the Chicago, Milwaukee, St. Paul and Pacific Railroad (hereinafter called the Milwaukee road) of its operations under trackage rights for transportation of iron ore over the line of plaintiff Esca-

naba and Lake Superior Railroad Company from Channing, Michigan, to Escanaba, Michigan.

The proceedings before the Commission were initiated by a petition filed March 12, 1935, by the Milwaukee road, the Chicago and North Western Railway Company (hereinafter called the North Western Line), and a non-operating subsidiary of the latter known as Escanaba, Iron Mountain and Western Railroad Company, docketed as No. 26903, under which applicants sought an order under paragraph (1) of Section 5, of the Interstate Commerce Act authorizing substantially the foregoing described pooling arrangement. The application was denied in a report (210 I. C. C. 599) and order entered September 24, 1935, without prejudice to a renewal of the application if and when the Milwaukee road procured a certificate of convenience and necessity under paragraph (18) of Section 1 of the Act for the abandonment of certain operations contemplated by the pooling plan. Thereafter, over the protest of plaintiff, the aforesaid proceeding under Docket No. 26903 was re-opened, by order of the Commission entered February 8, 1936.

Prior to such re-opening, the Milwaukee road had filed with the Commission on November 29, 1935, its contingent application under paragraph (18) of Section 1 for a certificate of public convenience and necessity seeking permission for abandonment of operation, undertrackage rights, over the line owned by the Escanaba and Lake Superior Railroad Company between Channing and Escanaba, Michigan, and for an order authorizing pooled use and operation of certain tracks and facilities in Michigan and Wisconsin, which was docketed by the Commission as Finance Docket No. 11025. The abandonment request was contingent upon favorable action on the pooling proposition.

Thereafter, the Commission conducted further hearings on the two applications which were heard on one record, and

on November 18, 1936, issued its report entitled in No. 26903 and embracing said Finance Docket No. 11025. The aforesaid order and certificate, herein sought to be set aside, were attached to said report.

The Escanaba and Lake Superior Railroad, extends from Escanaba where it joins the North Western Line, in a northwesterly direction 63 miles to Channing, Michigan, where it joins the line of the Milwaukee road. The section of the road extending from Escanaba to Watson, Michigan, 31 miles, was constructed prior to 1900, and primarily as a logging railroad. The Company was incorporated February 12, 1900, and in that year the western 32 miles from Watson to Channing, was constructed primarily for the transportation of iron ore and the entire line was reconstructed with heavier materials for the sake of the iron ore traffic. This was under a contract between the plaintiff and the Milwaukee road entered into in 1900 and expiring December 31, 1920. A new agreement, expiring January 1, 1951, was then made substantially in extension of the original agreement. Since the year 1900, the Milwaukee Road has run in ore trains from the Menominee Range via Channing over the line of railway owned and maintained by the Escanaba and Lake Superior Railroad Company.

The North Western Line also has been a very large carrier of iron ore from the Menominee Range, which moves over its line to Iron Mountain, Michigan, and thence eastward to Escanaba over a line owned by Escanaba, Iron Mountain and Western Railroad, the latter being merely a lessor and strictly non-operating company.

The Milwaukee Road ore docks becoming out of repair in 1932, the Milwaukee and North Western officials privately discussed the feasibility of a plan of pooling the ore traffic, of which the public and the Escanaba and Lake Superior Railroad had no knowledge until the aforesaid application was filed with the Commission.

The plaintiff in addition to being involved and interested in the ore traffic as indicated above, also interchanges with each of the applicants a large volume of general traffic other than ore on which joint rates are applicable; the plaintiff's revenues on this general traffic approximated $138,000, in the year 1935, which is representative; and the earnings of the Milwaukee and North Western thereon approximate $300,000 per annum. The agreement between the applicants which the Commission has approved, provides for the pooling of all of this joint traffic in which the Escanaba and Lake Superior Railroad Company is a participant in the rates and in transportation; and plaintiff has not consented thereto.

Nevertheless the said Commission found in its aforesaid report that the Escanaba and Lake Superior Railroad Company is not "a carrier involved" within the meaning of Section 5 (1) of the interstate Commerce Act; that "the carriers involved" in said pooling arrangement are the carriers who are parties to the pooling agreement; that none of the plaintiff's traffic or earnings are to be pooled and it is not a party to the pooling agreement and that therefore plaintiff's assent to the pooling was not necessary under Section 5 (1) of the Interstate Commerce Act; that "the Escanaba and Lake Superior Railroad is involved in the ore traffic as an active carrier and not as a mere non-operating concern, to the extent that its officers supervise and its employees do all the work of maintaining the tracks and road bed and dispatch the ore trains and regulate their movements and it receives operating revenues from the ore traffic and that said railroad is a participant in other general traffic covered by said pooling agreement in that as to such traffic said carrier joins in the rates, divisions, and earnings and in the complete physical transportation and that this is true regarding the traffic as it moves today and

that it will be true as to traffic which will move under the pooling plan, by which the earnings are to be divided between the carriers on fixed percentages provided in the agreement.

Similarly, in spite of the showing that if the pooling plan became effective, it meant the abandonment of the Escanaba and Lake Superior Railroad as to one of the primary uses for which that railroad was constructed and the discontinuance of one of its primary functions; that the probable result would be the abandonment of all operations over the major portion of that line, because the same would not be self-supporting without the ore traffic and that that would be detrimental to the public interest and against the convenience and necessity of communities in Delta, Marquette and Dickinson Counties of Upper Michigan, the Commission issued its certificate, as aforesaid, authorizing the contemplated abandonment.

On December 22, 1936, appellant filed in the District Court its petition seeking to enjoin, set aside and annul the aforesaid order and certificate of the Commission.

Hearing in the Ditsrict Court was had before a stautory court of three judges, findings of fact and conclusions of law were made by the court, the conclusion of the court being that the certificate and order complained of find adequate support in the record and that the prayer of the petition of the Escanaba and Lake Superior Railroad Company should be denied.

The questions presented by this appeal involve the correctness of the refusal of the Statutory Court to enjoin, set aside and annul the order and certificate of the Commission; the correctness of the court's conclusion that the Commission's issuance of its aforesaid order of November 18, 1936, is within its authority under Section 5 (1) of the Interstate Commerce Act; that the Escanaba and Lake Superior Railroad Company is not a carrier involved in the pooling ar-

rangement approved by that order; that the carriers involved in said pooling arrangement are the carriers who are parties to the pooling agreement; that none of the Escanaba and Lake Superior Railroad Company's traffic and none of its earnings are to be pooled and it is not a party to the pooling agreement and that, therefore, its assent to the pooling which is wholly between the Milwaukee road and the North Western Line is not necessary under Section 5 (1) of the Act. There is also involved the correctness of the conclusion and finding of the District Court that as a matter of law the Commission's said certificate that public convenience and necessity permit the abandonment by the Milwaukee Road of operation under trackage rights over the line between Channing and Escanaba is within the Commission's authority under Section 1 (18), (19) and (20) of the Interstate Commerce Act and in holding and concluding as a matter of law that in making the certificate and order approving the pooling arrangements, the Interstate Commerce Commission committed no error of law and that both are valid. It is submitted that these questions are substantial and important.

(D) Cases Sustaining Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

The Chicago Junction Case, 264 U. S. 258, 68 L. Ed. 667;

Claiborne-Annapolis Ferry Co. v. *United States*, 285 U. S. 382, 76 L. Ed. 809;

Powell v. *United States*, — U. S. —, 81 L. Ed. (Adv. Ips.) 423, decided March 1, 1937;

Virginian Railway Co. v. *United States*, 272 U. S. 658, 71 L. Ed. 463;

Beaumont, Sour Lake & Western Railway Co. v. *United States*, 282 U. S. 74, 75 L. Ed. 221;

New England Divisions Case, 261 U. S. 184, 67 L. Ed. 605;

The Los Angeles Switching Case, 234 U. S. 294, 58 L. Ed. 1319;

Merchants Warehouse Co. v. United States, 284 U. S. 501, 75 L. Ed. 1227.

JOHN S. BURCHMORE,
CLARK M. ROBERTSON,
Solicitors for Escanaba and Lake Superior Railroad Company.

APPENDIX.

THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION.

In Equity.

No. 831.

Escanaba & Lake Superior Railroad Company, a Corporation, *Plaintiff*,

v.

United States of America and Interstate Commerce Commission, *Defendants;* and Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, *Intervening Defendants.*

Before Simons, Circuit Judge, and Moinet and Raymond, District Judges.

Raymond, *District Judge:*

Plaintiff seeks under the authority of 28 U. S. C., secs. 41 (par. 28), 45, 46 and 47, to enjoin an order and certificate of the Interstate Commerce Commission entered November 18, 1936. The Commission's report issued therewith is found in 219 I. C. C. 285. That report and the findings of fact accompanying this opinion sufficiently state the relationship of the parties and the course of the litigation. Upon oral argument counsel agreed that the issues here for consideration are greatly restricted by the provisions of the Transportation Act of 1920 which introduced into Federal legislation a new railroad policy and vested the Commission with extensive powers and discretion beyond the scope of review by the courts. (See New England Divisions Case, 261 U. S. 184, 189; Texas & Pacific Railway Co. *v.* Gulf, etc. Railway Co., 270 U. S. 266, 277; and Colorado *v.* United States, 271 U. S. 153, 162, 163.)

In general, the order and certificate complained of authorize the pooling of iron ore traffic from the Menominee Range to the docks at Escanaba, Michigan, the pooling of the revenues therefrom, the expenses thereof, and of the tracks, equipment, facilities and employees engaged in that traffic between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago & North Western Railway Company; the pooling by these two railroads of their earnings on class and commodity traffic interchanged between them and the plaintiff at Channing and Escanaba; and the abandonment by the Milwaukee road of its operations under trackage rights for transportation of iron ore over the line of plaintiff's railway from Channing, Michigan, to Escanaba.

Plaintiff urges that the record contains no substantial testimony tending to prove that competition will not be unduly restrained by the pooling of traffic in iron ore; that there is no evidence to support findings sustaining the pooling of class or commodity traffic; that there is no substantial evidence warranting the commission's finding that public convenience and necessity permit abandonment of the operation by the Milwaukee road of plaintiff's railway line from Channing to Escanaba under the agreement for trackage rights, and argues that the overwhelming preponderance of the evidence is that the direct probable results of such abandonment will be serious injury and detriment to the public. Plaintiff also insists that the Commission's jurisdiction to authorize the pooling of freight by railroad is expressly limited by the requirement of paragraph 1 of sec. 5 of the act that division of traffic or earnings shall be assented to by all the carriers involved; that it is a carrier involved, and that its assent has not been given.

The binding effect of fact findings by the Commission and the limitations upon the power of the courts to disturb them have been so frequently noted that restatement is not required. See Pittsburgh & W. V. Railway Co. *v.* United States, 41 F. (2d) 806, 808. It is clear that courts may not consider the weight of the evidence or the wisdom of the order made provided there is evidence to sustain it.

The courts accord to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience". (See Illinois Central Railroad Co., et al. *v.* Interstate Commerce Commission, 206 U. S. 441.) In the instant case, the Commission found that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the pooling agreement; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable. Examination of the record is convincing that there is substantial evidence to support these findings. It is true that the applicants did not upon some issues produce all of the available evidence; that some of the evidence was of the kind commonly designated as opinion or expert evidence given by employees of some of the interested parties; and that other evidence was indirect or circumstantial. But these considerations do not warrant its rejection in determining whether or not there was more than a mere scintilla of evidence before the Commission. Such evidence is commonly accepted as convincing even in criminal trials. Against the admitted loss and inconvenience to the communities along the line of plaintiff's railroad, the Commission was charged with the responsibility of weighing the loss and inconvenience to the larger general public—national in scope. Under repeated decisions, we have no right to weigh this evidence to determine whether our conclusions thereon would differ from those of the Commission.

It is important to observe that the abandonment authorized by the Commission does not relate to usual and ordinary railroad operations. It is limited to the discontinuance of operations by the Milwaukee Railroad under a contract for trackage rights relating principally to the transportation of iron ore. Continuance by plaintiff of operation by the railroad is in no way limited. The trackage contract confers only a privilege. It does not obligate the Milwaukee to make any use of plaintiff's track. The pooling arrangement approved by the Commission enables

the Milwaukee to effect substantial economies which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually. Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right.

Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the interchange of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract the Milwaukee as lessee of trackage rights is the sole carrier of this traffic. Other traffic interchanged at Channing with the Milwaukee is not disturbed by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the consequences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway.

The conclusion of the court is that the certificate and order complained of find adequate support in the record and that the prayer of the petition filed herein should be denied. An order will be entered accordingly.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 415

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY,
APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLANT.

JOHN S. BURCHMORE,
CLARK M. ROBERTSON,
Solicitors for Appellant.

January 17, 1938.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLANT.

OPINION OF THE COURT BELOW.

The opinion of the statutory three judge court has been reported in 21 F. Supp. 151 and is set out in full at pages 422-425 of the printed record. The reports of the Interstate Commerce Commission in the proceedings before that body out of which this case arises are re-

ported at 210 I. C. C. 599 and 219 I. C. C. 285. These reports appear at pages 7 to 20 and 33 to 39 of the printed record herein. The Commission's order and certificate appear on pages 20-22 of the record.

JURISDICTION.

Paragraph 1 of Rule 12 has been complied with and on October 18, 1937, this Court entered an order noting probable jurisdiction.

STATUTES INVOLVED.

In conformity with Rule 27, the language of those sections of the Interstate Commerce Act which are involved in this appeal is set forth in full in an appendix hereto.

STATEMENT OF THE CASE.

This is a direct appeal by the plaintiff below from a decree of the United States District Court for the Western District of Michigan, sitting as a specially constituted three-judge court under the Act of October 22, 1913 (U. S. Code, Title 28, Secs. 45 and 47).

The decree of the court below dismissed appellant's bill of complaint for want of equity (R. 432) and in substance approved orders of the Interstate Commerce Commission authorizing and approving (a) the pooling of certain iron ore traffic, (b) the division of earnings on certain class and commodity traffic, and (c) the abandonment of certain operations by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company over the line of railway owned by appellant from Channing, Michigan to Escanaba, Michigan.

The bill of complaint sought a decree to set aside these orders on various grounds; and this appeal rests principally on the proposition that these orders were beyond the authority of the Commission to enter, because of the limitation on its jurisdiction imposed by par. (1) of Sec. 5 of the Act.

In this statement of the facts of the case, we have adopted and followed verbatim the findings of fact of the court below,[1] except the word plaintiff has been changed to appellant; the several findings have been arranged in new order, as indicated; and four paragraphs of additional statement have been interpolated, for which record references are shown.

Appellant is a railroad company incorporated under the laws of Michigan and is engaged in the interstate transportation of freight and passengers. It owns and operates a line of railway from Escanaba, Michigan, where it connects with the Chicago & North Western Railway and extends in a northwesterly direction for a distance of approximately sixty-three miles to Channing, Michigan, where it connects with the Chicago, Milwaukee, St. Paul and Pacific Railroad.[2] It is a common carrier subject to the provisions of the Interstate Commerce Act. (Finding 1; R. 426.)

The defendants are the United States of America and the Interstate Commerce Commission. The trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company were permitted to intervene as defendants. (Finding 2; R. 426.)

---

[1] The finding of the court numbered 14 contains certain errors to which appellant has excepted (R. 436) and is not, therefore, adopted and set forth herein.

[2] The physical circumstances of the case will be more readily understood by consulting the maps which are reproduced at pages 350-A and 356-A of the printed record.

The record before the Commission and before the court shows that the appellant company was incorporated February 12, 1900. The first section of its railway, comprising the southern 31 miles from Escanaba as far as Watson, was constructed previous to 1900, primarily as a logging railroad. The western 32 miles from Watson to Channing was constructed in 1900, primarily for the transportation of iron ore and under a contract of the appellant with the Chicago, Milwaukee & St. Paul Railroad Company for a term of twenty years, expiring December 31, 1920. Appellant's entire line was made of a much heavier type than would have been necessary for logging engines and trains, and with no grades or sharp curves, for the sake of the iron ore traffic. A new contract was executed between the Milwaukee Road and the appellant upon expiration of the original contract which will expire January 1, 1951. The agreement of 1900 was made at a time when the Milwaukee Railroad foresaw and was providing for a large increase in the iron ore traffic from the Menominee Range. It had previously handled that traffic by a route southbound over its main line through Channing down to Pembine, Wisconsin, thence over the Soo Line to the latter carrier's docks at Gladstone, Michigan. (Finding 10; R. 429.)

Since the year 1909, the Milwaukee Railroad has run its ore trains from Menominee Range via Channing over the line of railway owned and maintained by appellant and to docks at Escanaba owned by the Milwaukee road, for trans-shipment via lake vessels. The tariffs of freight rates under which this ore has moved are tariffs of the Milwaukee Railroad.[3] The engines and cars are owned and the train crews are employed by the Milwaukee road. The appellant is lessor of the tracks from Channing to Escanaba, it maintains the tracks, under a high standard

[3] The record shows, however, that the Milwaukee road in publishing this tariff, has shown the appellant Escanaba and Lake Superior Railroad as a carrier participating therein. (R. 233.)

of maintenance, and it dispatches the movements of the ore trains. (Finding 11; R. 429.)

The Chicago & North Western Railway also has been a very large carrier of iron ore for many years past from the Menominee Range to Escanaba which moves over its line of railroad to Iron Mountain, Michigan, and thence eastward over a line owned by Escanaba, Iron Mountain and Western Railroad, which is a wholly owned non-operating subsidiary of the North Western, to ore docks owned and operated by the North Western at Escanaba. (Finding 12; R. 429.)

The ore traffic is an important source of income to the Escanaba and Lake Superior Railroad (R. 375, 414a), which serves some 18 communities along its line (R. 212) and the probable result of the discontinuance of the ore traffic would be the abandonment of that line west of Groos as it would not be self-supporting without that traffic. (R. 312, 364, 365, 366, 419; Exhibits 17, 18, 19, 20.)

In addition to the ore traffic, the Escanaba and Lake Superior originates and terminates a considerable volume of general traffic, a large amount of which is interchanged with the Milwaukee Road at Channing and with the North Western Line at Escanaba and which moves upon applicable joint rates. (R. 225, 226, 367, 368; Exhibits 21a, 22, 23.)

The North Western and Milwaukee Roads together received on this class and commodity traffic interchanged with the Escanaba Road, which they propose to pool, the round sum of $1,758,000 in the six years 1927 to 1932, according to their own testimony. (R. 281.) This was exclusive of iron ore. The appellant's substantial interest in the earnings on this same general interchange traffic may be illustrated by the figures for the year 1935, when they amounted to the sum of $128,591.01. (R. 422.)

Both the North Western and Milwaukee own numerous spur, industrial and sidetracks and yard facilities for the switching of cars handling ore traffic at Escanaba, Michigan, and each operates, owns and maintains large ore docks at Escanaba, where ore is transferred from cars into vessels for trans-shipment to various Lake Erie and Lake Michigan Ports *en route* to iron and steel plants. (R. 42.)

The ore docks of the Milwaukee Road at Escanaba became seriously out of repair in 1932 and since that time that road has been making use of the North Western ore docks. Thereupon, the officials of the two roads made a private study, which was completed in 1932, of the feasibility of a plan of pooling the ore traffic. This resulted in the execution of a pooling agreement. (Finding 13; R. 430.)

On March 12, 1935, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Chicago & North Western Railway Company and the previously mentioned non-operating subsidiary of the latter known as Escanaba, Iron Mountain & Western Railroad Company filed application with the Interstate Commerce Commission under which they sought an order under paragraph 1 of Sec. 5 of the Interstate Commerce Act authorizing applicants to pool ore traffic and divide the earnings therefrom, moving from the Menominee Range in Michigan and Wisconsin to the docks at Escanaba, as provided for in an agreement between the three parties, a copy of which was attached to said application. The agreement also provided for the pooling of certain substantial traffic other than iron ore from the Menominee Range,[4] namely

[4] As hereinafter discussed, the Escanaba and Lake Superior Railroad hauls a substantial volume of iron ore, originating on the Marquette Range, and delivered to it by the North Western or Milwaukee roads. This apparently comes within the provisions of paragraph 52 of the contract. The tonnages of such ore are substantial and will be found reported in Exhibits 21, 21-A and F-13. (R. 366-7, 420.)

all class and commodity traffic interchanged by the applicants with the appellant, as described, the substance of the agreement being as follows:

> "52. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is, therefore, agreed that from the effective date of this contract the revenues of the two companies from all business interchanged with the Escanaba and Lake Superior shall be pooled on the following basis:" (Finding 3; R. 426.)

Subsequently, by appropriate petitions and orders the trustees, appointed by the United States Court at Chicago in proceedings under 77-B of the Bankruptcy Act, of both the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company joined in the aforesaid application. (Finding 4; R. 427.)

The aforesaid application was denied in a report (210 I. C. C. 599) and an order was entered September 24, 1935, without prejudice to a renewal if and when the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should procure from the Commission a certificate of convenience and necessity under paragraph (18) of Section 1 of the Act for the abandonment of certain operations, as contemplated by the aforesaid pooling plan. (Finding 5; R. 427.)

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed with the Commission on November 29, 1935, a contingent application under paragraph (18) of Section 1 for a certificate of public convenience and necessity, in substance seeking permission for abandon-

ment of operation, under trackage rights, over the line owned by the Escanaba and Lake Superior Railroad Company between Channing and Escanaba, Michigan, and for an order authorizing pooled use and operations of certain tracks and facilities in Michigan and Wisconsin, as more fully set forth in its application, which was docketed as Finance Docket No. 11025. The abandonment request was contingent upon favorable action on the pooling proposition. Thereafter, the aforesaid trustees of the property joined in said application. (Finding 6; R. 427.)

Appellant Escanaba and Lake Superior Railroad Company did not assent to the aforesaid pooling arrangement.[3] It intervened in the aforesaid proceedings and presented evidence in opposition to both applications. The Escanaba Chamber of Commerce and other organizations and representatives of the communities in the territory affected intervened and offered testimony in opposition to both applications. (Finding 7; R. 427.)

On November 18, 1936, an order was made and entered by the Interstate Commerce Commission, approving and authorizing the pooling by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees, and the Chicago & North Western Railway Company, Charles P. Megan, Trustee, and the Escanaba, Iron Mountain & Western Railroad Company (a wholly owned and controlled subsidiary of the Chicago & North Western Railway) of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Michigan, for trans-shipment beyond, and of certain class and commodity traffic, and for division of earnings there-

[3] The applicants did not consult with the Escanaba and Lake Superior Railroad concerning the proposed pooling plan (R. 130, 205); their negotiations between themselves were secret; and no other pooling arrangement, in which appellant's railway might have been employed was given serious consideration. (R. 120, 313.)

on, on terms and conditions set forth in the contract referred to in the Commission's report. On the same date, the Commission made and entered a certificate of public convenience and necessity in a proceeding entitled Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment of Operation, certifying that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights, over the appellant's line of railroad between Channing and Escanaba, Michigan, in Dickinson, Marquette and Delta Counties, Michigan. (Finding 8; R. 428.)

On December 22, 1936, appellant brought this suit to set aside the order and certificate of November 18, 1936. Answer was duly filed by the defendants and intervening defendants and hearing upon said petition was held at Grand Rapids, Michigan, January 22, 1937, before a court constituted of three judges, it having been stipulated that said hearing might be held at Grand Rapids, Michigan, in the Southern Division, instead of in the Northern Division. At said hearing there was introduced a certified copy of the evidence introduced before the Commission at the hearings held by it in the aforesaid proceedings,[6] also certified copies of certain other portions of the Commission's record in said proceedings. (Finding 9; R. 428.)

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[6] In the printed record before this court, there has not been reproduced any of the testimony of the numerous witnesses for the communities affected, or for the Railway Brotherhoods, in opposition to the pooling and abandonment. This because appellant has withdrawn its exception that there was not sufficient testimony to support the order.

SPECIFICATION OF ASSIGNED ERRORS URGED HEREIN.

The following assignments of error are relied upon (R. 434-436).

The Court erred:

1. In dismissing appellant's complaint for want of equity.

2. In failing and refusing to enjoin, set aside and annul the order of the Interstate Commerce Commission entered November 18, 1936, authorizing the pooling by the Milwaukee Road and the North Western Line of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Michigan, and of certain class and commodity traffic, and for division of earnings thereon and in failing and refusing to set aside and annul also the certificate of the Commission made and entered the same date in Finance Docket No. 11025, certifying that the present and future public convenience and necessity permit the abandonment by the trustees of the Milwaukee Road, of operation under trackage rights over the Escanaba and Lake Superior Railroad between Channing and Escanaba, Michigan.

3. In finding and concluding as a matter of law that the order of the Interstate Commerce Commission of November 18, 1936, is within the Commission's authority under Section 5 (1) of the Interstate Commerce Act; that appellant is not a carrier involved in the pooling arrangement approved by said order; that the carriers involved in that pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement; that none of appellant's traffic and none of its earnings are to be pooled and it is not a party to

the pooling agreement; that therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under Section 5 (1) of the Interstate Commerce Act.

4. In holding and concluding as a matter of law that in making said certificate and said order approving the pooling arrangements the said Interstate Commerce Commission committed no error of law, and that both are valid.

5. In entering its finding of fact, numbered 14, correctly stating that appellant also interchanges with each of the applicant railroads a large volume of general traffic which moves over through routes and under joint rates of the appellant with each such applicant and that such agreement between the applicants, as approved by the Commission, provides for the pooling of earnings of joint traffic, and thereon erroneously finding and concluding that there is no pooling of the traffic itself or of the facilities used in moving the traffic; that there is nothing in this portion of the pooling which interferes with the interchange, routing or division of earnings allocated to appellant or with the rates on the traffic so interchanged; by the application to the respective roads of 30 per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with the appellant, and competition between the Milwaukee Railroad and the North Western Railway on traffic originating and terminating on the line of the appellant is thereby preserved.

SUMMARY OF ARGUMENT.

[In this summary and throughout the argument which follows, for brevity the appellant will be referred to at times as the Escanaba road; the applicant Chicago, Milwaukee, St. Paul and Pacific Railroad Company (and its trustees) will be referred to as the Milwaukee road; the applicant Chicago and North Western Railway Company (and its trustees) will be referred to as the North Western road. The aforementioned Escanaba, Iron Mountain & Western Railroad Company, a subsidiary of the North Western, will be referred to as the Iron Mountain road.]

The jurisdiction of the Interstate Commerce Commission, under par. (1) of Section 5 of the Interstate Commerce Act, to approve and authorize a combination or agreement among carriers for the division of traffic or earnings is dependent upon the assent of all carriers involved.

The Commission authorized and approved a certain agreement of the applicants North Western, Milwaukee and Iron Mountain roads for the pooling of freights and division of earnings without the assent and against the protest of appellant. Appellant is a carrier involved within the meaning of the jurisdictional phrase and contends:

(a) The phrase "assented to by all the carriers involved" should be construed according to the usual and generally accepted meaning of the words.

(b) The phrase is not limited to the protection of the parties who are signatory to a proposed pooling agreement.

(c) The purpose of the phrase is the protection of any carrier from a combination by other carriers, destructive of its business. It was designed to prevent unreasonable

and unjust pooling of traffic and earnings to the detriment and without the assent of all carriers substantially affected and having an interest in the subject matter and source of the traffic.

(d) Appellant is a common carrier subject to the Act; it has been a carrier as to the ore traffic and will be deprived by this plan of its interest and participation therein.

(e) Appellant is a common carrier of the class and commodity traffic which the applicants interchange with it and appellant will be substantially affected by the proposed division of earnings thereon.

(f) Appellant is substantially affected by the whole pooling arrangement both as to the pooling of ore traffic from the Menominee Range and the division of earnings on all class and commodity traffic which the applicants interchange with appellant, both features considered together or separately.

(g) The sum and substance of the entire plan proposed by the applicant carriers is the elimination of appellant and nullification of the contract under which appellant's railroad was constructed. The substantial portion of appellant's railroad was constructed under a contract with the Milwaukee road for the primary purpose of transporting the iron ore from the Menominee Range. By constructing its railroad under the terms of this contract, it is submitted that the appellant obtained an interest in the ore traffic in common with that of the Milwaukee road and the Milwaukee road cannot now be permitted to maintain to the contrary.

The abandonment of certain operation, for which the Commission issued a certificate of convenience and necessity, was applied for contingent upon the lawful approval of the pooling arrangement. As the pooling arrangement should be disapproved, the certificate of abandonment should be canceled.

I.

Pooling of traffic or earnings is lawful only when approved by the Commission with assent of all carriers involved.

Combinations for the pooling of railroad traffic or earnings were originally specifically forbidden by Section 5 of the Interstate Commerce Act,[7] which declared:

> "it shall be unlawful for any common carrier subject to this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof";

This absolute prohibition remained in full force and without exception until the Transportation Act of 1920, by which a proviso was added to Section 5:

> "That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises."

The application to the Commission, which resulted in the order here under attack, was brought under this proviso.

[7] The language here quoted is from the present Act. It corresponds with the original language as found in the 1887 enactment of the Act to Regulate Commerce, excepting that the words "subject to the provisions of this act" were used instead of the present words "subject to this act".

to escape the general prohibition against pooling agreements, and it is from the proviso that the authority of the Commission is derived.

In thus extending the power and authority of the Commission in this class of cases, the Congress saw fit to circumscribe that authority with definite requirements limiting its exercise. Thus it is to be noted that the approval of the Commission must come "after hearing", and that it must be based upon findings that the division of traffic or earnings will be in the interest of better service to the public, or economy in operation; that competition will not be unduly restrained; and that the terms and conditions, and the consideration between the carriers, are just and reasonable in the premises. Having so found, the Commission may then authorize and approve such division of traffic or earnings, "if assented to by all the carriers involved". By this final qualification Congress has imposed an absolute limitation upon the authority of the Commission which effectively forestalls any pooling arrangement not assented to by all the carriers involved. The Escanaba railroad, appellant herein, is seriously and adversely affected by the pooling arrangements; it contends that it is such a "carrier involved", and that since its consent to the proposed pooling arrangement is not given, the Commission had no authority to approve such an arrangement.

The Commission rejected this contention and approved and authorized the proposed pool over the protest of the appellant, whereupon this suit was brought. There is now no question before the Court which calls for the exercise of expert discretion or judgment and the ultimate question which is presented is one of statutory construction. The decision of that question is within the sole province of the courts and the construction adopted

by the Commission is not authoritative or binding upon the courts or on the parties.

II.

Meaning of the term "carrier involved."

The problem of particular statutory construction here presented is one which has never before been considered judicially. We are mindful of the important function which we here invoke, capable as it is of defeating or effectuating the purpose of the legislative branch of government. To aid this Court to interpret correctly the language used by Congress, therefore, we respectfully direct attention to the application of recognized methods of statutory construction based upon reason and experience. In addition to the apparent meaning of the phrase, taking the words as used in their common sense and observing the elementary rules of grammar, the Court may also properly consider the context in which it is used. Other sections of the Act may serve to reveal a policy and purpose on the part of Congress which will indicate further the legislative purpose in using the phrase under scrutiny. Whatever process of reasoning is followed, the important inquiry must be as to the legislative intent.

STATUTE AND DICTIONARY DEFINITIONS.

The language employed in the statute must be given the usual and accepted meaning.

The term "carrier" as used in the Interstate Commerce Act, is expressly defined in paragraph (3) of Section 1 as reproduced in the appendix hereto.

The word "involved" is not defined in the Act itself and appears in one other section only. (Sec. 213, (3), (e).)

Turning to the dictionaries ordinarily consulted for the commonly accepted meaning of words, we find the following definition of the word *involve* in the *Oxford English Dictionary:*

"d. To include or affect in its operation."

SIGNIFICANCE OF THIS POOLING PLAN.

In any litigated case a necessary corollary to the question of statutory construction, is the question of application of the statute to the situation presented by the record, which is indeed merely a different approach to the same problem, and because the only present practical importance of the statute lies in its effect upon this case. The facts of the case therefore become of vital importance in that they either present a situation within the purview of the statute or they do not. Thus the question in this case is whether the appellant is a carrier involved, which is to say, did Congress intend, under the circumstances presented, to require the consent of this carrier to the pool proposed by the applicant carriers.

In the past the Milwaukee and North Western railroads have both served as originating carriers from the mines on the Menominee Range, and have competed for the traffic. Ore shipped over the Milwaukee goes to Escanaba by way of Channing and over the tracks of the Escanaba Railroad from Channing to Escanaba. The North Western road trains run from the mines to Escanaba via Iron Mountain; and from Iron Mountain to Escanaba the trains move over the rails of the Iron Mountain road, the North Western's wholly owned subsidiary. These carriers have likewise competed for traffic originating at or destined to Escanaba and points local to the Escanaba Railroad, which traffic is interchanged

with the North Western at Escanaba and with the Milwaukee at Channing.

For the future, the purpose and result of the pooling plan is that practically all of the ore will be hauled by the North Western from the mines, whether in the Iron River, Crystal Falls, Stambaugh or Iron Mountain-Norway local areas, and will move via Iron Mountain and thence over the rails owned by the Iron Mountain road to Escanaba for loading into lake ore boats at the North Western docks. The Milwaukee road will move ore only from the relatively unimportant Amasa area (the North Western abandoning its Amasa branch), and this ore instead of moving via Channing, thence direct to Escanaba, will be taken into Iron Mountain and thence go via North Western (Iron Mountain road rails) to the Escanaba ore docks (R. 158-9).

The stated purpose of this arrangement is better service and economy of operation. Peculiarly enough, however, the economy of operation is produced by two features, wholly disassociated with the road haul movement; first, the elimination of duplication of service at the mines and, second, the elimination of duplicate ore docks at Escanaba. There is no possibility of any resultant economy through moving the road haul trains over the Iron Mountain railroad, instead of over the Escanaba road, and none has been established.

The fact is that this pool of ore traffic grew out of negotiations begun by the Milwaukee for the purpose of gaining the use of the North Western docks at Escanaba by reason of the fact that the Milwaukee docks were in bad repair and the Milwaukee could not afford to build new ones. Despite the obvious fact that a pooling arrangement which included the appellant in the road haul would be feasible and would produce the same economies as

the present one (R. 298), the only plan which the North Western would go along with and the only way the Milwaukee could get the North Western to let them use its docks at Escanaba was the present one, namely, in which the ore all moved into Escanaba over the North Western tracks (R. 313, 130).

The fact is obvious that such an arrangement could have only one effect as concerned the appellant; namely, the destruction of its business with the resultant necessary abandonment of at least that part of the line west of Groos,[7] the major portion of which was originally built to accommodate the ore traffic and which could not be self sustaining without the revenue from the ore traffic.

The applicant carriers not only realized but intended that this result should obtain; the applicants further realized that the appellant would no longer be able to interchange at Channing with the Milwaukee but would necessarily connect only with the North Western at Escanaba (R. 282). The Milwaukee therefore insisted (R. 144, 175) on the inclusion in the agreement of paragraphs 52-55, which provided for a pooling between the North Western and Milwaukee of the earnings from traffic interchanged with the appellant and a division thereof on a fixed percentage basis[8] (R. 282).

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[7] Groos is a point just beyond the Soo Line crossing, in the direction of Channing (R. 262), and is described in the part of the record which was not printed on appeal. Local conditions along the line west of Groos are outlined or described (R. 216) and the traffic originating on the Escanaba road west of Groos is tabulated in Exhibits 22 and 23 (R. 367-8).

[8] In examining the provisions of the pooling agreement, it is important to follow the language of the contract as finally approved and executed, appearing as Exhibit 1 (R. 316-350). This contains certain vital clauses (including Section 55), not appearing in the original draft, which was annexed to the application to the Commission and which is also reproduced of record. (R. 49-67.)

Paragraph 52 thus candidly recites, as inducement, that

> "By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the E. & L. S. if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenues if this arrangement is put into effect."

By pooling these earnings and dividing them on a basis arrived at by a study of past experience, under the arrangements now existing, the Milwaukee will be kept whole and will not lose anything by this feature of the plan in the future, even though the North Western receives from appellant the interchange traffic which the Milwaukee now enjoys.

Paragraphs 53 and 54, provide further for what the applicants correctly considered the not too remote possibility of the North Western acquiring the tracks or terminals of the appellant. The Milwaukee will continue to receive, under the contract, its share in the earnings even though the North Western acquires the property of the appellant; and if the terminals of the appellant are acquired by the North Western, the applicants, Milwaukee and Northwestern, will submit to arbitration the question as to how much the North Western should pay the Milwaukee as divisions of earnings arising out of what had formerly been interchange business.

Paragraph 55 of the agreement[9] completes the picture by providing for the establishment of appropriate through rates and divisions for handling interline traffic via Iron Mountain so as to permit the Milwaukee to continue handling business to and from industries served by the appel-

[9] The provisions of paragraph 55 do not appear in the original draft of contract, attached to the application to the Commission. It was subsequently added and appears in the contract finally signed. (R. 339.)

lant either direct or through reciprocal switching arrangements with the North Western.

This feature, while innocent in terms when taken by itself, is part and parcel of the ore pooling plan. As such its vicious character as regards the appellant becomes plain. For appellant's connection with the Milwaukee having been effectively broken by the ore traffic pool, appellant's service will then be confined to the relatively short haul from Watson or Groos into Escanaba or even to a mere switching service at Escanaba. The applicants will pool not only their own earnings on the interchange traffic but also a large part of appellant's former share which it will not then be able to earn. In 1935, appellant's share amounted to nearly $140,000. (R. 422.) Thus while the Milwaukee and North Western have amply protected their own individual interests by agreement, the Escanaba road is to be relegated to the position of a mere switching line at Escanaba with, perhaps, a short spur to Watson or Groos. With its operations thus limited and its principal business destroyed, the applicants contemplated it may soon become so subservient financially that it will be taken over by the North Western as a branch line. We submit that, in equity, this is an unjust and unconscionable result in total disregard of appellant's property rights.

THE PLAIN PURPOSE OF THE ACT IS TO PREVENT UNJUST AND UNREASONABLE POOLS.

Section 1 (4) of the Interstate Commerce Act provides that every carrier shall provide equitable divisions of joint rates as between carriers participating in such rates, which shall not unduly prefer or prejudice such participating carriers. Section 3 (3) prohibits discriminations in rates between competing connecting lines and forbids undue prejudice to any connecting line in the distribution of traffic. Section 15 (4) forbids the establishing by the

Commission of through routes at the expense of short hauling a carrier without that carrier's consent.

Each of these sections is directed against a specific practice and none of them would afford an efficient vehicle for escape from such an unjust situation as that in which the appellant is involved. However, taken as illustrative of congressional policy, we respectfully submit that, collectively and individually, they evidence a concern on the part of Congress for the individual interests of competing railroads and point to a general policy of prohibiting unfair discriminations among railroads. In harmony with this policy, Congress thus provided that the approval of traffic or money pools by the Commission must be with the "assent of all carriers involved" and, further that the terms and conditions of the plan, and the consideration as between the carriers "shall be found by the Commission to be just and reasonable in the premises." It seems inescapable that the provision requiring the consent of carriers involved in pooling arrangements was born of the same concern for justice and fairness and that to hold that the appellant in this case is not a carrier involved would be to permit a result inconsistent with the plain intent of the statute.

We submit that, in the light of the foregoing facts and their practical significance, the appellant railroad is a "carrier involved" within the meaning of the statutes; that is to say that Congress intended by using the phrase "if assented to by all carriers involved" to protect a carrier situated like the appellant from the imposition of a plan such as the one here approved by the Commission over its protest.

III.

The District Court erred in sustaining the order of the Commission and in holding that appellant is not a carrier involved.

We should first consider what the Court and the Commission said in their respective opinions, concerning this jurisdictional question.

In its final report, the Commission decided for itself the question of law presented, refused to recognize this limitation upon the authority delegated by section 5 (1) of the Act, and proceeded to approve the abandonment and pooling plan proposed in the application. In so disposing of the contention of the Escanaba road the Commission said (R. 19, our italics):

> "Section 5 (1) is specific in setting out jurisdictional findings of fact which are prerequisite to our approval of a pooling agreement. One of these is that the agreement must be 'assented to by all the carriers involved * * *.' The Escanaba Company contends that it is a carrier involved within the meaning of the act, and since it has not assented to the pooling agreement, we do not have jurisdiction to approve and authorize the agreement. It is therefore necessary to determine whether the Escanaba Company is a carrier involved within the meaning of the act. As pointed out in the original report, the Escanaba Company never participated as a carrier in the ore traffic in the past. Its status was that of a lessor of trackage rights to the Milwaukee. It does not now participate in this traffic as a carrier. Under these circumstances, it cannot be considered a carrier involved in the pooling agreement now before us. It necessarily follows there[10] that *the*

[10] As this decision is reported in the Commission's bound volumes, 219 I. C. C. 285, 295, the word "here" is used in this sentence instead of the word "there". In the preceding sentence, the word "agreement" appears in plural form, "agreements".

carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanaba Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard."

The Commission further observed (R. 18) that as to the pooling of earnings from interchange traffic:

> "The pooling plan as to traffic other than the ore traffic is intended as insurance of revenue to the Milwaukee[11] which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of the line of the Escanaba Company and is merely incidental to the pooling of the ore traffic. There is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the public; that costs of operation will be reduced, or that competition will be unduly restrained. However, *according to the record, the earnings of the Escanaba Company on this traffic and services to the public would in no way be affected by the proposed division of earnings by applicants so long as traffic originating at, or destined to, points on the Escanaba is handled as at present.*"

The District Court apparently subscribed completely to the view of the Commission, for it adopted that view without further analysis of the question and held (R. 425):

> "Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the inter-

[11] In the decision as reported in 319 I. C. C., at page 294, the phrase "is intended as insurance of revenue to the Milwaukee" has been changed to read "is intended as insurance to the Milwaukee of revenue".

change of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that *plaintiff is not a carrier of the ore traffic.* We must hold that under the contract the Milwaukee as lessee of trackage rights is the sole carrier of this traffic. *Other traffic interchanged at Channing with the Milwaukee is not disturbed* by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the consequences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway."

Subsequent to the rendition of its opinion, the court entered formal conclusions of law, (to which appellant has assigned error) including the following (R. 430):

"2. The Commission's order of November 18, 1936, is within its authority under section 5(1) of the Interstate Commerce Act. Plaintiff is not a carrier involved in the pooling arrangement approved by said order. The carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement. None of plaintiff's traffic and none of its earnings are to be pooled, and it is not a party to the pooling agreement. Therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under section 5(1) of the Act."

THE PHRASE "ALL CARRIERS INVOLVED" IS NOT LIMITED TO INCLUDE ONLY THE PARTIES TO THE PROPOSED POOL.

At the outset it is to be noted that both the Commission and the Court said that the carriers involved in the pooling arrangement are the carriers which are parties to that agreement. It is not entirely clear either from the report of the Commission or from the opinion of the Court whether it was meant thereby that the phrase "carriers involved" necessarily includes only the parties to the agreement; and we conclude that it was not so meant. Indeed to have so held would have been manifestly erroneous.[12]

The language of the statute must be given its usual and accepted meaning. The words "carrier" and "involved" are not words of art, having a legal significance not related to their common use; they are not so used in the statute. And conceivably, had Congress intended that the consent only of the participants in a prospective arrangement should be required, it would have used a phrase so designed as to convey that meaning. It would have said so, in so many words. Grammatically the statute is unambiguous. It provides that the Commission may authorize, if assented to by all carriers involved, such divisions of traffic or earnings. From this it is clear that the carriers whose assent must be had, are those involved in the divisions, and whose traffic or earnings are affected, not merely the participants in any *proposed* arrangement or agreement or contract, for it is the division of traffic or earnings which the Commission approves.

[12] We are here considering the language of the opinion of the District Court. (R. 425.) In point of fact, however, in the second of the formal Conclusions of Law subsequently entered by the court, after receiving suggestions of counsel (R. 430), it would appear that the phrase had been applied as meaning that appellant is not "involved" solely because it is not a party to the agreement.

Obviously Congress did not so limit the phrase and to so construe it would be to fly in the face of the legislative intent, because the term "pooling" itself implies a voluntary concert of action. *In Re Pooling Freights,* 115 Fed. 589. The parties to the agreement necessarily must have assented thereto or they would not be parties to the agreement. Thus to so limit the phrase would be to render it mere surplusage, without any substantive meaning or practical effect.

Furthermore, the fact that appellant is not a party to the agreement and therefore not a carrier involved, (if we accept the narrow meaning above described), is the consequence only of the refusal of the defendant carriers to not include it in their negotiations. They admit, as we have seen, that another agreement might have been entered into in which the appellant would have been a necessary party, and that the same economies might have been made thereby. It is significant that the North Western and Milwaukee made the Iron Mountain road a party to the pool and to the application, and thereby indicated undeniably that appellant (which, as an operating carrier, is much more involved as a practical matter than the non-operating Iron Mountain), could very well have been made a party to the prospective plan. We submit that the arbitrary and selfish whim of the proponents of a pooling arrangement is not the test for determining whether the consent of a third carrier is required by the statute.

On the contrary, we submit that the phrase here under consideration was designed for the protection of any carrier having a substantial interest in the subject matter of the pool, or who is affected by it, and that the true purpose of the provision is to prevent exactly what is transpiring in this particular case, *i. e.*,—to prevent any group of transportation systems from combining by agree-

ments of this character against the interest of other carriers, without their assent, which might be obtained by some corresponding beneficial arrangement preserving the economic life of the carrier so involved.

In the plain meaning of the phrase a carrier is involved if it has a substantial interest in the subject matter of the pool. For as this Court said in *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, at page 47:

> "There is a division of freight among several railroads, where, by agreement or otherwise, the companies have a common interest in the source from which it is obtained."

In the court below, it was suggested by appellees that to hold the Escanaba railroad to be a "carrier involved" as to the class and commodity traffic interchanged between it and the North Western and Milwaukee roads, or is in the proposed division of earnings on such traffic, would have the practical result of nullifying the purpose of the 1920 amendment to paragraph (5) of Section 1. This for the claimed reason that no such pooling could ever then be authorized by the Commission unless practically all the carriers of the United States assented thereto, on the theory that conecting carriers in joint through traffic would generally be within the meaning of the term "carriers involved", so construed. By an attempted *reductio ad absurdum,* they sought to show that the result of holding in favor of the plaintiff herein would be to nullify the legislative expression in the statute. For as they say, if the appellant is a "carrier involved" in the pooling of the earnings of the North Western and Milwaukee on traffic handled jointly with the Escanaba railroad, then it must logically follow that any railroad connecting with the North Western and Milwaukee is also a "carrier involved." We submit that this does not follow at all,

and for the simple reason that connections of the Milwaukee and North Western railroads at Chicago, for example, in point of fact would have no real interest in any pooling of earnings as between the North Western and Milwaukee roads, and would not be affected in any substantial respect by such pooling. On the other hand, looking at the plan as a whole, we have seen what a substantial and immediate interest the Escanaba road has in the source of the traffic and in the subject-matter of the pool.

This community of interest effectively distinguishes it from a mere connecting carrier.

Indeed, the sole test set up by the plan itself as to whether the earnings on class and commodity traffic are or are not to be pooled, is whether such traffic is interchanged with the Escanaba railroad. It seems hard to imagine that where a participation of a road is a test for determining the operation of a pool, that it is not, however, to be regarded as affected or involved in such pool.

We further suggest that the scope of the term "all the carriers involved," as used in this section of the statute, is generally coincident with that of the term "any party in interest," used in paragraph (20) of section 1 of the Act, in the provision reading:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, * * * or any party in interest."

This latter term has been construed by the Supreme Court in *Western Pacific California Railroad Company* v.

Southern Pacific Company, 284 U. S. 47, 76 L. ed. 160. In the course of the opinion, the court said:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 448, 67 L. ed. 1078, 1085, 43 S. Ct. 597. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act."

Again, in *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, at page 390, 76 L. ed. 808, at page 814, the court construed and applied the same foregoing statutory reference to "any party in interest," saying that in view of previous cases:

> "it must be held that appellant is a 'party in interest' within the meaning of the statute capable of in-

> stituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation."

There would seem to be no sensible reason for holding that in a situation like this, the Escanaba railroad has a sufficient interest to qualify it as a party in interest to the abandonment application, but, on the other hand, that it is not one of the carriers involved and that, therefore, its assent to the pooling plan is not essential.

Appellant is a carrier involved.

As we have observed above, the District Court in its written opinion did not expressly rest its conclusion upon the proposition that the only carriers involved are the carriers which participate in the prospective arrangement, although its fourteenth finding and second conclusion of law clearly suggests that view. On the other hand, neither did it suggest any test or criterion which would indicate any other concept of the statutory limitation upon the Commission's authority. Instead it followed closely the line of simple legalistic reasoning by which the Commission had arrived at its conclusion.

Reduced to essentials, the Court simply stated that the appellant is not a carrier of the ore traffic, that other traffic was not disturbed by the pooling arrangement and that therefore it was not a carrier involved in the pool. It apparently recognized, though it did not give any strong clue as to what it thought the statute meant, that if the appellant was a carrier of the pooled traffic and if its interest or participation therein were disturbed by the pool it would be a carrier with respect thereto and also involved therein.

THE COURT ERRED IN HOLDING THAT THE APPELLANT IS NOT A CARRIER.

There is no question but that appellant is a common carrier subject to the provisions of the Act and the Commission and the Court have so found. Unlike the Iron Mountain road, it is not a non-operating company but on the contrary it is engaged in the transportation of passengers and property in interstate commerce.

It does not lose that status by reason of the arrangement with the Milwaukee road, whereby trackage rights are granted to that road for the hauling of ore traffic from the Menominee Range. For despite the fact that the Milwaukee road furnishes the engines and cars and employs the train crews, the Escanaba road furnishes the roadbed and track and performs the dispatching and signaling services controlling the movements of the trains.

The District Court's holding that the Escanaba road was not a carrier of the ore traffic (R. 425) was predicated upon the fact that the ore was carried by the Milwaukee in its own cars, with its own locomotives, in trains operated by its crews and under rates in which the Escanaba road did not participate.

There is no dispute as to these facts. But the Court erroneously emphasized the use of the cars and locomotives of the Milwaukee road as indicating that that road is the sole carrier as to the ore traffic via Channing. In *Union Pacific Railway Company* v. *Chicago, R. I. & P. Railway,* 163 U. S. 564, 16 Sup. Ct. 1173, under factually similar circumstances to those in this case, this Court held that the contract for joint use of the Union Pacific tracks was not *ultra vires* but that as to the operation under that contract the Union Pacific maintained its status even though the rolling stock was that of the Rock Island

lines, because the Union Pacific controlled the movement of the trains and furnished the dispatching and signalling. See also *Chicago, Rock Island and Pacific Railway Company* v. *The Denver and Rio Grande Railroad Company*, 143 U. S. 596, 36 L. ed. 596.

The important point is that by controlling and regulating the movement of trains in interstate transportation, as well as furnishing and maintaining the "railroad", *i. e.*, the instrumentalities and facilities of transportation, the appellant is performing the functions of a carrier as much as if its cars and engines also were used. Its part in the transportation is basically more important than the mechanical operation of the trains. (See paragraphs (3) and (4) of Section 1 of the Interstate Commerce Act.)

Assuming, *arguendo*, that the Court correctly held that the appellant does not participate as a carrier and that it must so participate if it is to be regarded as a "carrier involved," it must be recalled that the pooling arrangement involves not only the ore traffic from the Menominee Range moving over the rails of the Escanaba road, but involves also a very large volume of carload traffic interchanged by the Escanaba road, either with the North Western road through Escanaba, or with the Milwaukee road through Channing.

This interchange traffic is of considerable volume, affording substantial annual revenues to the parties concerned, and is of two descriptions: The *first*, is of ore originating on the Marquette Range, and of which from 200 to 800 carloads per year are exchanged by the appellant chiefly with the North Western road, under joint rates applying thereon (R. 366-7, 241); and *second*, class and commodity traffic in general (R. 308, 422). The earnings on all of this traffic are to be divided between the

North Western and Milwaukee, which have heretofore competed in such transportation.

As to this traffic the appellant is undeniably a carrier in the most strict sense of the term, since it concurs in the rates, moves the traffic in its own equipment, with its crews and engines, and assumes every attribute of the common carrier.

It would be difficult to see how any common carrier could be more practically and legally affected by the pooling arrangement, as regards the ore traffic. It is even more difficult to see how any carrier could need protection more than this appellant and yet not be considered a carrier affected by such pooling agreement.

THE COURT ERRED IN FINDING THAT OTHER TRAFFIC IS NOT DISTURBED BY THE POOL.

It should be emphasized that the pooling arrangement involves not only the ore traffic from the Menominee Range moving over the rails of the Escanaba road, but involves also aforesaid large volume of carload traffic interchanged by the Escanaba road either with the North Western road through Escanaba, or with the Milwaukee road through Channing.

The Court tacitly recognized this fact but reasoned that this "other traffic is not disturbed by the pooling arrangement," thus indicating apparently that, though the appellant might be a carrier of that traffic, it was not involved in the pool. In so holding the lower Court committed a plain error of fact and failed entirely to recognize the obvious significance of the pooling arrangement.

Obviously, in and of itself, the agreement between the North Western and the Milwaukee to pool their earnings on traffic interchanged with the appellant does not result

automatically in a direct increase or diminution of the volume of that traffic, though as we will point out below, that feature of the plan alone will have a definite adverse effect upon appellant, which necessarily involves it in the pool.

The fact is, however, as the Commission said (R. 18):

> The pooling plan as to traffic other than the ore traffic is intended as insurance of revenue to the Milwaukee which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of the line of the Escanaba Company and is merely incidental to the pooling of the ore traffic. There is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the public; that costs of operation will be reduced * * *.

And, as we have seen, it will be the inevitable result of the present pooling plan; which is expected by all parties thereto, that the connection of the Escanaba road with the Milwaukee at Channing will be necessarily broken because of the diversion of the ore traffic. Thus, all the class and commodity traffic now interchanged at Channing will necessarily move via the North Western at Escanaba and to hold otherwise is to ignore the express provisions of the agreement between the North Western and the Milwaukee.

It is unquestionably true, therefore, that this traffic *will be disturbed* and that the appellant is involved in the pool in that it will for the future be limited to an interchange of traffic with the North Western at Escanaba.

The appellant is further involved in that feature of the pooling plan which relates to the pooling of earnings from traffic of which it is a carrier, because of the *direct* effect which that pool will have upon the appellant's participation in that traffic. This because the pool has the

direct consequence of wholly eliminating all competition for that traffic.

This is not to say that the finding of the Commission as to the effect of the pooling plan upon competition is necessarily erroneous.

The Commission gave no consideration at all to the effect upon appellant of the elimination of competition between the applicant carriers. Because the appellant was not a party to the agreement, the Commission did not consider at all the justice and reasonableness of the terms and conditions of the proposed plan as it affected the appellant. Its finding, therefore, bears only upon the restraint of competition as between the Milwaukee and North Western in its relation to service to the public. From the standpoint of the appellant, however, the elimination of this competition necessarily will have disastrous results.

That these results do obtain, simply from the restraint of competition, this Court will readily observe. For, we submit, a complete lack of incentives on the part of applicants to accord the appellant beneficial treatment in the interchange of traffic, coupled with a complete loss of bargaining power on the part of the appellant, cannot but work to the detriment of appellant's business as a railroad. *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 667, 68 L. ed. 258.

ACTIONS OF APPLICANTS ARE AT VARIANCE WITH THEIR CONTENTIONS.

The contention of the applicant railroads that the Escanaba road being only lessor or grantor of trackage rights may not therefore be considered as one of the "carriers involved," is inconsistent with and contradicted

by the actions of the applicants themselves. The Escanaba, Iron Mountain & Western Railroad Company is owner of the line from Iron Mountain to Escanaba, over which the North Western ore trains have moved and will continue to move under the pooling arrangement *en route* to the docks. That company is not an active common carrier as to any traffic whatsoever, and is simply and exclusively the owner and lessor of the line in question. In this respect, therefore, appellant is much more involved as a carrier than is the Iron Mountain. Nevertheless, the Escanaba, Iron Mountain & Western Railroad Company is a party to the pooling agreement, and it is one of the applicants who sought and obtained from the Commission approval of and authority for the pooling arrangement. (R. 41.)

This is admitted in the answer filed by the defendant Interstate Commerce Commission, in the court below. (R. 25.)

The order entered by the Commission authorizing and approving the pooling plan names the Escanaba, Iron Mountain & Western Railroad as one of the carriers involved. It reads (R. 21):

> "*It is ordered*, That the pooling by the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George L. Haight, trustees, of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract referred to in the report, be, and it is hereby, approved and authorized."

Although the Iron Mountain road is a wholly owned subsidiary of the North Western road, it is to be noted that corporate action by the Iron Mountain directors was obtained, approving the plan, and applicants made a point of this in the record before the Commission. (R. 130) It is quite apparent, therefore, that the principal applicants at one time, at least, had a very different idea as to what constituted a "carrier involved" under the statutory clause in question, from the concept they urged upon the Court below.

The entire western half of appellant's railroad was constructed for the primary purpose of transporting this Menominee Range ore in cooperation with the Milwaukee road. And under a long term contract between the two roads, the line of railroad, consisting of tracks, switches, water tanks and other facilities and instrumentalities owned by appellant, have been utilized in the transportation of this ore to Escanaba. The result of the pooling plan as approved by the Commission will be the abandonment of these facilities and instrumentalities owned and maintained by appellant as to their principal purpose and use. Indeed, by the terms of the formal agreement, as approved by the Commission, the parties thereto have joined in the express covenant that "the Milwaukee shall discontinue operations between Channing and Escanaba over the lines of the Escanaba and Lake Superior Railroad." (R. 337.)

Upon these facts, bearing in mind the broad language of paragraphs (3) and (4) of Section 1 of the Act, we submit it cannot properly be contended that this carrier is not substantially affected by the proposed plan, as a carrier, or that it is not in the real sense of the term "a carrier involved" in the pooling of the iron ore traffic.

IV.

The District Court's fourteenth finding is erroneous.

In paragraph 5 on page 11, *supra*, we have restated appellant's specific assignment of error directed to certain features of the findings of fact entered by the District Court as No. 14. (R. 430.)

In short, appellant contends that the District Court erred when it concluded, as to the general class and commodity traffic interchanged by the Milwaukee and North Western roads with the Escanaba road, (a) that there is no pooling of the traffic itself or of the facilities used in moving the traffic; (b) that there is nothing in this portion of the pooling which interferes with the interchange, routing or division of earnings allocated to appellant, or with the rates on the traffic so interchanged; and (c) that by the application to the respective roads of thirty per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with the appellant, so that competition between the Milwaukee and the North Western on traffic originating and terminating on the line of appellant is thereby preserved.

These three phases of finding No. 14 disregard the real purpose and contemplated result of sections 52 to 55 of the contract, and of the agreement as a whole, matters which are sufficiently presented in the preceding chapter of this brief and these conclusions rest on the erroneous assumption that the fundamental conditions in the situation of the Escanaba road will not be vitally affected by the pooling contract in its entirety, and in particular by section 52.

Moreover, as to (a), the specific terms of the formal contract clearly contradict the statement that there is to

be no pooling of the traffic itself, or of the facilities used in moving the traffic.

As to (b), it is an unwarranted assumption that the traffic will not be disturbed. Indeed, the Commission in its report qualified the conclusion that the earnings of the Escanaba Company and the services to the public would in no way be affected, by adding the words "so long as traffic originating at, or destined to points on the Escanaba *is handled as at present*".

Furthermore, as to (c), the application to the respective roads of thirty per cent of their earnings on the interchange traffic, at best would simply represent the out of pocket cost of moving such traffic[14]; and manifestly the receipt of mere out of pocket cost furnishes no incentive whatever for any carrier to compete for any traffic.

V.

The certificate of abandonment should be set aside.

The order and certificate of the Commission, under Finance Docket No. 11025, as a part of this whole arrangement, authorizes the abandonment by the Milwaukee road of operations under trackage rights over the line owned by the Escanaba road.

The application on which this certificate of convenience and necessity was entered was a contingent application, strictly conditioned upon the authorization and effectiveness of the pooling arrangement (R. 84).

In the court below appellant asserted that there was no substantial evidence to support the order of the Commission; and as the printed record before this court shows, the abandonment was opposed by representatives of the

[14] This is clear from the specific language of the contract itself, for section 52 reads: "less an amount of thirty per cent of such gross revenues to cover cost of handling by either company".

communities affected and by every interest appearing in the case, other than the applicants Milwaukee road and the North Western. We have withdrawn the assignment of error against the sufficiency of the evidence to support the Commission's order, recognizing that it takes but little more than a scintilla of evidence to support a finding of fact of the Commission.

If the order authorizing and approving the pooling arrangement is held to be beyond the Commission's jurisdiction, as herein claimed, we submit it must follow that the certificate of convenience and necessity authorizing abandonment must fall.

The decree of the statutory court was founded on substantial errors in construction and application of the statute, as we submit, and therefore we respectfully ask that the cause be remanded with instructions to enter a decree setting aside the orders and certificate of the Commission on the jurisdictional grounds stated.

JOHN S. BURCHMORE,
CLARK M. ROBERTSON,
Solicitors for Appellant.

January 17, 1938.

APPENDIX.

The Interstate Commerce Act

(Being the Act to Regulate Commerce as Amended)
U. S. Code, Title 49, Chapter 1.

Section 1.

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

* * * * *

(3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or arti-

ficial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

(4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the car-

riers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

* * * * * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect

to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 3.

(3) All carriers, engaged in the transportation of

passengers or property, subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 5.

(1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of

traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

Section 15.

(4) In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

FILE COPY

No. 415

In the Supreme Court of the United States

OCTOBER TERM, 1937

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

FEBRUARY 1938.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 415

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 422), *Escanaba & Lake Superior R. Co.* v. *United States,* is reported in 21 F. Supp. 151. The Court's separate findings of fact and conclusions of law (R. 426–431) are reported with the opinion.

The first report of the Commission, Division 6, dated September 24, 1935, entitled *Pooling of Ore Traffic in Wisconsin and Michigan* (R. 33–39), is published in 210 I. C. C. 599. The report of the Commission, Division 4, on further hearing, dated November 18, 1936 (R. 7–20), is published in 219 I. C. C. 285.

JURISDICTION

The decree of the District Court was entered March 23, 1937. (R. 432.) Petition for appeal was filed May 3, 1937, and was allowed on the same day. (R. 434, 436.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, sec. 345).

QUESTIONS PRESENTED

Whether appellant, not a party to the pooling plan authorized by the Commission's order here in question and none of whose traffic or earnings is embraced in the plan, is a "carrier involved," within the meaning of that term as used in section 5 (1) of the Interstate Commerce Act, authorizing the Commission "* * * by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings * * *."

Whether the Commission's certificate authorizing abandonment by the Milwaukee of operation, under trackage rights over appellant's line between Channing and Escanaba, which abandonment is an integral part of the plan for the pooling as between the Milwaukee and the North Western, is a valid exercise of the Commission's authority.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, as amended, are printed in the appendix, *infra,* p. 62.

STATEMENT

This is an appeal from a final decree (R. 431–432) of the specially-constituted District Court dismissing the appellant's bill to enjoin and set aside the Commission's order and certificate of November 18, 1936 (R. 20–22). The order authorizes the trustees of the Milwaukee and the North Western to pool interstate ore traffic shipped over their lines from mines in the Menominee Range of Michigan and Wisconsin to Escanaba, Mich., for transshipment by lake vessels beyond, and to pool their earnings on class and commodity traffic moving over their respective lines to and from points on appellant's line and interchanged between appellant and the Milwaukee at Channing, Mich., or between appellant and the North Western at Escanaba, on

terms and conditions set forth in the contract executed by the Milwaukee and the North Western (Exhibit No. 1, R. 316–350).[1]

The certificate certifies that the present and future public convenience and necessity permit the abandonment by the Milwaukee of operation, under trackage rights, over appellant's line between Channing and Escanaba. (R. 8, 22.)

Application seeking approval of the pooling, under section 5 (1) of the Act, was originally filed with the Commission March 12, 1935, by the Milwaukee and the North Western. (R. 41–74.) After hearing (R. 111–246) the Commission on September 24, 1935, issued a report (R. 33–39) finding, among other things, that "the abandonment by the Milwaukee of the use of the Escanaba [appellant's] tracks is the keynote of the pooling agreement. Without such abandonment the agreement for pooling would not be practical," and that a certificate of public convenience and necessity under section 1 (18) would be necessary to a lawful abandonment of such operation under trackage rights. The application for approval of the pooling was there-

[1] The contract and the order also name the Escanaba, Iron Mountain & Western Railroad Company but that company is here neglected because it is a wholly owned and controlled subsidiary of the North Western whose line between Iron Mountain and Escanaba, Mich. (the more northerly of the two lines between those points shown in red on the map, R. 350A), is leased to and operated by the North Western (R. 42, 117, 130).

fore denied but without prejudice to the filing of further applications. (R. 39.)

On November 29, 1935, the Milwaukee filed application for such a certificate (R. 78–85) and renewed its application for an order authorizing the pooling.

The trustees of the Milwaukee joined as parties applicant in the abandonment proceeding (R. 85) and in the pooling proceeding (R. 74). The trustee of the North Western also joined in the latter. (R. 9, 76.)

Hearing in the abandonment proceeding and further hearing in the pooling case was held jointly February 26–27, 1936 (R. 246–316), and on November 18, 1936, the Commission issued a second report (R. 7–20) and with it the order and certificate here in question. (R. 20–22.)

The Commission found and concluded "that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the contract; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable." (R. 20.)

The Commission further found and concluded "that the present and future public convenience and necessity permit the abandonment by Henry

A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation under trackage rights over the line of the Escanaba and Lake Superior Railroad Company in Dickinson, Marquette, and Delta Counties, Michigan, described in the application recorded in Finance Docket No. 11025." (R. 20.)

Some of the principal facts, as shown in the Commission's reports, are here stated.

Appellant's line extends from Escanaba to Channing, 63.5 miles.[2] (R. 9.) It connects with the North Western at Escanaba and with the Milwaukee at Channing. (R. 15.) It is a common carrier engaged in the transportation of freight from and to points on its own line and between points on its own line, on the one hand, and points on the Milwaukee and the North Western and their connections, on the other hand. Its line does not reach or serve any of the mines in the Menominee Range and it does not transport any ore shipped from those mines to Escanaba for transshipment over the docks there. (R. 19.)

A line of the Milwaukee extending northward from Chicago passes through Iron Mountain,

[2] A map showing the Menominee Range, the appellant's line, and lines of the Milwaukee and North Western involved in the pooling, in colors, introduced in the Commission proceeding as Exhibit No. 2, R. 113–114, appears in the record as page 350A. Other maps appear at R. 100 and R. 356A.

Mich. and Channing. Branches extending westward from Channing reach iron ore mines in the vicinity of Amasa, Crystal Falls and Iron River, Mich. (R. 9–10.) The Milwaukee transports the ore in carloads from these mines to Channing, where it maintains a yard for the assembling of the cars into trainloads, and then moves the trains by its own power and crews, under trackage right, over the rails of the appellant to Escanaba. (R. 10.) The trains, upon reaching Escanaba, leave the rails of the appellant and enter a yard owned by the Milwaukee, where the trains are broken up and the individual cars switched to the docks for delivery to the lake vessels.[2] (R. 10, 11.)

The Milwaukee's trackage rights over appellant's line were first provided by a contract entered into on February 20, 1900. (Exhibit No. F–1, R. 376–392.) At that time appellant's line was a logging road extending from Escanaba to Watson, Mich., a distance of about 31 miles. This contract recited that appellant proposed to extend its line from Watson to a junction with the Milwaukee at or near Channing. The fulfillment of this condition consummated the contract, which, under its terms, was to be operative until January 1, 1921. On January 1, 1921, the appellant and the Milwaukee entered into a new agreement (Exhibit F–1–A, R. 393–410) which provided that appellant granted

[2] See map, introduced in the Commission proceeding as Exhibit No. 3, R. 114, appearing in the record as page 350–B.

the Milwaukee the right to use said line to the extent and upon the terms and conditions set forth therein, the contract to remain in force until January 1, 1951. This contract gave the Milwaukee the right to transport its ore trains over appellant's line under the conditions and upon the compensation stated therein. It did not give the Milwaukee the right to use appellant's line for any other traffic except certain coal westbound and certain company material eastbound. It does not permit the Milwaukee to do any local business at stations on appellant's line and the Milwaukee in fact does not serve those local stations. (R. 9, 10, 35, 168, 395.)

A line of the North Western extends from Chicago to Escanaba. It has two lines extending westward from Escanaba to Iron Mountain, which closely parallel each other, and a single line in a northwesterly direction to Iron River, with a branch to Crystal Falls and Amasa. Iron ore mines in the Menominee Range served by it are located on these lines and branches. It transports the ore to Iron Mountain and thence over one or the other of its two lines to Escanaba. (R. 10–11.)

The North Western has an extensive yard at Escanaba and two docks there in serviceable condition, constructed at a cost of $1,750,000 each. (R. 10, 11, 120.)

The Milwaukee owns two docks at Escanaba, known as docks 1 and 2, which were built about 35

years ago and have not been reconstructed. Under a temporary arrangement, the Milwaukee used the North Western's docks in 1932 and 1933. In 1934 the Milwaukee used its own Dock No. 2. This it was able to do by making temporary repairs costing approximately $30,000 and because the traffic that year was very light. But the Milwaukee's docks since that time have deteriorated to such an extent that they have not been usable. In 1935 it used the North Western docks on the terms agreed to in the pooling contract. (R. 10, 11, 113, 120, 121, 159, 180.)

Because its docks had reached such a state of deterioration in 1934 that they were beyond repair, the Milwaukee was faced with the necessity of either rebuilding the docks, at large expense, or making some arrangement with the North Western. (R. 180, 257.) Tentative plans for a pooling arrangement on the ore traffic as between the Milwaukee and the North Western had been under consideration for a number of years. (R. 113.) The complete wearing out of the Milwaukee's docks brought the matter to a head (R. 113), and on April 11, 1935, the Milwaukee and the North Western entered into a pooling agreement (Exhibit No. 1, R. 316–350), to be put into effect upon the Commission's approval. (R. 318.)

Under this agreement the Milwaukee is to handle with its road trains and crews all ore from the mines in the vicinity of Amasa over its own line to

its point of connection with the North Western at Iron Mountain, where the ore would be delivered to the North Western for movement to Escanaba. All other ore from the Menominee Range would be handled by the road trains and crews of the North Western from production points to Escanaba over its own rails. From Iron Mountain to Escanaba the loaded ore cars would move over the line of the North Western's subsidiary, the Escanaba, Iron Mountain & Western Railroad Company, and the empty cars would move back from Escanaba to Iron Mountain over the line of the North Western. This arrangement would virtually furnish a double-track movement, although slightly longer than the present route, as these lines nearly parallel each other between the points indicated. The details of this proposed operation are contained in the contract.[4] (R. 10–11.)

The North Western's docks at Escanaba will be used for the entire traffic. (R. 10.)

Under the pooling arrangement the Milwaukee will have no occasion to exercise its trackage rights over appellant's line and it is an integral part of the pooling plan that this operation be abandoned. (R. 8, 36.)

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[4] The contract as finally executed by the chief executives of the North Western and its subsidiary the Escanaba, Iron Mountain & Western, and the Milwaukee, received in evidence as Ex. No. 1 (R. 113, 244) appears in full in the record here, R. 316–359.

All revenues from ore traffic from the Menominee Range transshipped through the dock of the North Western at Escanaba would be apportioned under the pooling contract upon the division of the business obtaining during the 10-year period 1923 to 1932, which was 34 percent to the Milwaukee and 66 percent to the North Western. The expenses directly connected with the movement of the ore would be divided upon the same percentages as the revenues. Locomotives and cars for the movement would likewise be furnished upon the same percentages. (R. 11–12.)

Substantial savings will be effected by this pooling. If the Milwaukee were to continue handling ore to docks it would be necessary to rebuild its dock No. 1 at an estimated cost of $1,000,000. (R. 13.) This new dock would cost the Milwaukee annually about $110,000 for interest, depreciation, maintenance, taxes and fire insurance and protection (R. 13), whereas the annual cost to the Milwaukee in similar items for use of the North Western's dock under the terms of the contract is estimated at approximately $46,000. (R. 13.) This and other savings, detailed in the Commission's report, would total $109,675 per annum. (R. 13–14.) Still other savings which cannot be reduced to figures would be accomplished by joint handling of the ore tonnage through the docks, from joint or consolidated switching on the range or at intermediate points, and of train service between the range

and the docks. There would also be substantial savings to the Milwaukee in the reduction in the number of ore cars required. (R. 14.)

The abandonment by the North Western of its Crystal Falls-Amasa branch (shown in green on the map, R. 350A) is part of the ore pooling arrangement. (R. 15, 36, 114, 337.) At the time of the Commission's report herein the North Western had not obtained a certificate under section 1 (18) authorizing such abandonment. (R. 15.) Since then the North Western has applied for and obtained such a certificate, *Chicago & North Western Railway Company Trustee Abandonment and Operation*, 224 I. C. C. 8, decided September 23, 1937, not included in the record herein.

Pooling of revenue on class and commodity traffic.—Interline traffic between points on appellant's line and points on the North Western or the Milwaukee and their connections is interchanged between appellant and the North Western at Escanaba or between appellant and the Milwaukee at Channing, respectively (R. 14, 15, 18, 35). One provision of the pooling contract between the North Western and the Milwaukee provides that their revenues on this traffic shall be pooled. The total revenues derived by each company from such traffic interchanged with appellant, less 30 percent of such gross revenues to cover cost of handling by either company, is to be put into a pool and divided as agreed to in paragraph 52 of the contract (R. 339),

based on the percentages of the traffic moving over their respective lines during the 6-year period 1927 to 1932 (R. 14).

For the 6-year period 1927 to 1932 the total net revenue on traffic to and from points on appellant's line accruing to the Milwaukee was $766,645 and to the North Western $992,290 (R. 14).

This part of the agreement relates only to general or class and commodity traffic. It does not relate to the ore traffic from the Menominee Range to Escanaba for transshipment over the docks. That traffic has never been interchanged by either the Milwaukee or the North Western with appellant. The North Western has transported such traffic over its own line. The Milwaukee has transported such traffic over its own line to Channing and thence under its trackage right over appellant's line with no "interchange" at Channing. But the trackage contract does not give the Milwaukee the right to do any local business on appellant's line. (R. 9, 10, 35, 168, 395.) Hence any traffic reaching Channing over the Milwaukee destined to a point on appellant's line is turned over to the appellant at Channing for transportation by it to destination.

Under the pooling contract this class and commodity traffic may be hauled by either the Milwaukee or the North Western. The contract itself does not provide for any change in the physical handling of the traffic. *Only the revenue is to be*

pooled, i. e., the revenue accruing to the North Western and the Milwaukee. (R. 15.)

In the year 1935 the appellant's revenues on such inter-line traffic interchanged with the Milwaukee at Channing was $69,884 and interchanged with the North Western at Escanaba, $68,706. "Such revenues would not be affected," the Commission found, "so long as the appellant continues its present plan of operation." (R. 15; Ex. F–16, R. 422.)

Under another provision of the contract the North Western agrees to join with the Milwaukee in establishing appropriate joint rates and divisions for handling inter-line traffic via Iron Mountain, so as to permit the Milwaukee to continue handling traffic to and from industries served by appellant, either direct or through reciprocal switching arrangements with the North Western. The revenues on such traffic interchanged at Iron Mountain would be included in the foregoing pool the same as traffic interchanged at Channing. (R. 14–15.)

The provision of the contract regarding the establishment of joint rates between the Milwaukee and the North Western on traffic interchanged with appellant would seem to contemplate that at some later time appellant's line might be abandoned west of Groos or west of Northland, thus discontinuing the only connection, at Channing, with the Milwaukee. Discontinuance of service by ap-

pellant on the western end of its line into Channing would necessarily destroy the competitive nature of this class and commodity traffic interchanged with the appellant, for the reason that it would leave open but one route for its movement, namely, via Escanaba and the North Western.[5] It is true that the appellant's line connects with the Minneapolis, St. Paul & Sault Ste. Marie at North Escanaba, but the latter line is principally an east and west railroad and any route by that line to Chicago, Ill., or lower Wisconsin destinations would be circuitous and not ordinarily used. (R. 14–15.)

This part of the pooling plan relating to traffic other than the ore traffic is intended as insurance to the Milwaukee of revenue which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of appellant's line *and is merely incidental to the pooling of the ore traffic.* (R. 18.)

The Commission said there is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the pub-

[5] Establishment of joint rates by the North Western and the Milwaukee via Iron Mountain would give the shipper an additional route. For example, shippers at Escanaba could route traffic to Milwaukee, Chicago, etc., via the appellant's line to Channing, thence the Milwaukee, or via the North Western direct, or via the North Western to Iron Mountain, thence the Milwaukee. If the western portion of appellant's line were abandoned, the shippers would still have two routes. (R. 144–146.)

lic, that costs of operation will be reduced, or that competition will be unduly restrained. "However, according to the record," the Commission said, "*the earnings of the Escanaba Company on this traffic and services to the public would in no way be affected by the proposed division of earnings by applicants* so long as traffic originating at, or destined to, points on the Escanaba is handled as at present." (R. 18–19.) [Italics supplied.]

This was followed by the ultimate finding "that the proposed pooling arrangement *considered in its entirety,* will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; * * *." (R. 20.) [Italics supplied.]

SUMMARY OF ARGUMENT

I. It is established by findings of the Commission and the court below, upon evidence not here challenged as inadequate, that none of appellant's traffic or earnings is to be pooled. Such a carrier is not a "carrier involved" within the meaning of section 5 (1) of the Interstate Commerce Act whose assent is necessary as a condition to an order by the Commission approving and authorizing division of traffic or earnings. By these provisions the Commission is not given authority to require pooling, but only to approve and authorize pooling if assented to by all the carriers involved. Under the language of section 5 (1) as a whole, the car-

riers involved would seem clearly to be only the carriers whose traffic or earnings are to be embraced in the pool. Under appellant's suggested interpretation that the provision was designed for the protection of any carrier having a substantial interest in the subject matter of the pool or who is affected by it, any carrier who feared it would be adversely affected, even to a slight extent, by a proposed pooling arrangement as between other carriers, could effectively block the plan by the simple expedient of withholding its assent. So interpreted the provision would fail to accomplish its purpose, which was to encourage pooling where economy in maintenance and operation could be secured, to the end of developing adequate national transportation service. "To this end," the Court said in *New England Divisions Case,* 261 U. S. 184, 190, "the Commission was empowered, among other things, to permit pooling of traffic or earnings." The words "if assented to by all the carriers involved" are merely words of limitation upon the Commission's authority. The cases cited by appellant do not support its suggested interpretation.

The pooling by the Milwaukee and the North Western of their earnings on class and commodity traffic interchanged with appellant is merely incidental to the pooling of the ore traffic and its purpose was to protect the revenues of the Mil-

waukee in the event of a shift of the traffic now interchanged with the Milwaukee at Channing over to the North Western through Escanaba, and, in the event the western part of appellant's line were abandoned and the only connection between appellant's line and the Milwaukee thereby broken. As found by the Commission this pooling as to the general traffic, which is a pooling only of the North Western's and the Milwaukee's earnings thereon, would in no way affect the earnings of the appellant on this traffic or its services to the public, so long as traffic originated at, or destined to, points on the appellant's line is handled as at present. The revenues of carriers other than the Milwaukee and the North Western are untouched by this pool and, under a reasonable construction of the statute, the assent of such other carriers is unnecessary.

There is nothing to show that appellant will be subjected to any disadvantage or prejudice in the interchange of traffic as the result of this pooling arrangement.

There is no proposal to change any of appellant's divisions of joint rates. It is protected in this regard by section 15 (6) of the Interstate Commerce Act requiring just and equitable divisions of joint rates. *New England Divisions Case*, 261 U. S. 184.

(a) The purpose of section 5 (1), as amended by Transportation Act, 1920, was to encourage pool-

ing arrangements as aids in the development of adequate national transportation service. This is shown by the Commission's recommendations, by the testimony of Commissioner Clark before the Committee, and by the other provisions of section 5 as enacted at that time. It is thus clear that in enacting the Transportation Act Congress sought to obtain, as far as feasible and practicable, the advantages of unified control which governmental operation had demonstrated, by providing for pooling, consolidations, mergers and acquisitions of control wherever, upon application of the carriers and after full hearing, it was found by the Commission that it would be in the public interest to do so. The pooling provisions are therefore entitled to a liberal construction. *Piedmont & Northern Ry.* v. *Comm'n,* 286 U. S. 299, 311, 312.

II. The certificate authorizing the Milwaukee to abandon operation under trackage rights over appellant's line is a valid exercise of the Commission's authority under section 1 (18) and (19). In *Colorado* v. *United States,* 271 U. S. 153, this Court said, at page 168, that "The sole test prescribed is that abandonment be consistent with public necessity and convenience." This is also the test as to abandonment of operation under trackage rights, *Transit Commission* v. *United States,* 289 U. S. 121, and governs in this case. The carriers here seeking to pool are both in the hands of trustees under the Bankruptcy Act and have sustained large deficits.

Substantial economies can be effected by them through the ore pooling arrangement involving abandonment by the Milwaukee of its ore traffic operations over appellant's line. This abandonment and pooling is therefore of national concern and the effecting of the resulting economies is in the public interest.

ARGUMENT

I

The term used in section 5 (1) "if assented to by all the carriers involved" is properly interpreted as meaning only the carriers whose traffic or earnings are to be pooled

Section 5 (1) of the Interstate Commerce Act, as amended by Transportation Act, 1920, after providing—

> That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense:

contains the following proviso:

> *Provided,* That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

Appellant does not deny that application was filed in this case by the carriers whose traffic and earnings are to be pooled and divided, that a full hearing was held by the Commission upon the application, and that the Commission made the quasi-jurisdictional findings required by the statute. Nor does it deny that the Commission's findings, certificate and order are supported by substantial evidence. Its principal contention is that it is a carrier involved within the meaning of section 5 (1) and inasmuch as it has not assented to the pooling, the order is beyond the Commission's authority.

It is established by findings of the Commission and the court below, upon evidence not here challenged as inadequate, that none of appellant's traffic or earnings is to be pooled. In its first report the Commission found (R. 35–36) that the appellant "has no direct interest in or control over the [ore] traffic or the earnings derived therefrom. It has never participated as a carrier in such traffic. The only interest it has in the matter is as lessor of trackage rights to the Milwaukee, for which compensation is paid as above stated."

This finding was affirmed in the second report (R. 19). After observing that "Section 5 (1) is specific in setting out jurisdictional findings of fact which are prerequisite to our approval of a pooling agreement" one of these being "that the agreement must be 'assented to by all the carriers involved * * * ,'" the Commission stated the appellant's contention "that it is a carrier involved within the meaning of the act, and since it has not assented to the pooling agreement, we do not have jurisdiction to approve and authorize the agreement," and that it was "therefore necessary to determine whether the Escanba Company is a carrier involved within the meaning of the act," determined the question in the negative, finding:

> As pointed out in the original report, the Escanaba Company never participated as a carrier in the ore traffic in the past. Its status was that of a lessor of trackage rights

> to the Milwaukee. It does not now participate in this traffic as a carrier. Under these circumstances, it cannot be considered a carrier involved in the pooling agreement now before us. It necessarily follows here that the carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanaba Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard. (R. 19.)

The contention was renewed in the court below and overruled for the following reasons as stated in its opinion (R. 425):

> Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the interchange of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's

concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract the Milwaukee as lessee of trackage rights is the sole carrier of this traffic. Other traffic interchanged at Channing with the Milwaukee is not disturbed by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the consequences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway.

The Court's conclusion of law No. 2, upon this subject, reads (R. 430):

The Commission's order of November 18, 1936, is within its authority, under section 5 (1) of the Interstate Commerce Act. Plaintiff is not a carrier involved in the pooling arrangement approved by said order. The carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement. None of plaintiff's traffic and none of its earnings are to be pooled, and it is not a party to the pooling agreement. Therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under section 5 (1) of the Act.

Since none of appellant's traffic or earnings is to be included in the pool it would seem clearly, under the provisions of section 5 (1) that it is not a carrier involved. By these provisions the Commission is not given authority to require pooling, but only to approve and authorize pooling if assented to by all the carriers involved. Within the meaning of the provision the carriers involved would seem clearly to be only the carriers whose traffic or earnings are to be pooled.

Appellant urges that the phrase "all carriers involved" is not limited to include only the parties to the proposed pool, and submits that the phrase was designed for the protection of any carrier having a substantial interest in the subject matter of the pool, or who is affected by it. (Br. pp. 26, 27.)

Under such an interpretation any carrier who feared it would be adversely affected, even to a slight extent, by a proposed pooling arrangement as between other carriers, could effectively block the plan by the simple expedient of withholding its assent. So interpreted the provision would fail to accomplish its purpose, which, as shown by its legislative history (referred to more fully hereinafter, *infra*, p. 42), was to encourage pooling where economy in maintenance and operation could be secured, to the end of developing adequate national transportation service. In *New England Divisions Case*, 261 U. S. 184, 190, this Court said:

> To this end * * * the Commission was empowered among other things, to permit pooling of traffic or earnings, * * *; to authorize abandonment of unprofitable and unnecessary lines, * * *.

The phrase is therefore entitled to the interpretation suggested by the language of the section as a whole and not unduly broadened so as to restrict its application. The "carriers involved" within the meaning of the proviso seem clearly to be those referred to in the first part of the section, namely, those who would enter into the arrangement "for the pooling of freights," or for the division between them of "the aggregate or net proceeds of the earnings or any portion thereof." Congress intended to permit, under the terms of the proviso, that which it had theretofore prohibited.

The words in the proviso "and for such consideration as between *such* carriers," further indicate

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* Other decisions explaining the broad purpose of the Transportation Act are *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, et seq.; *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244; *Colorado* v. *United States*, 271 U. S. 153; *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 341 et seq.; *Texas & Pacific Ry.* v. *Gulf &c. Ry.*, 270 U. S. 266, 277; *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1; *Transit Commission* v. *United States*, 289 U. S. 121, 128. It may be noted that the latter decision settled the question whether section 1 (18) of the Interstate Commerce Act applies to operation of one carrier over the line of another under trackage rights. Under that decision it is clear that a carrier may neither commence nor abandon operation under trackage rights without a Commission certificate.

that the carriers involved" are "such carriers" whose traffic or earnings are to be divided, and not those merely having some interest in the pooling and who may be incidentally affected.

The language of section 5 (1) is similar in this respect to the subsequent provisions of the section relating to consolidations, mergers, or acquisitions of control. Those provisions do not attempt to force railroads to consolidate or merge their properties or to acquire control of other railoads, but grant power to the Commission to approve and authorize such unification, in whole or in part, if appropriate application by the carriers involved is filed and the Commision finds the unification to be in the public interest.

With the Commission's authorization the Milwaukee and the North Western, instead of pooling the ore traffic and the earnings thereon, could consolidate or merge their lines over which they now transport the ore traffic, under the provisions of paragraph (4) of section 5. The assent of other carriers, not parties to the consolidation or merger agreement, would not be necessary. An example of the merger of parts of lines is found in *Unification of Lines in Southern New Jersey*, 193 I. C. C. 183, in which the Commission authorized the Pennsylvania and the Reading railroads to merge their parallel and competing lines in New Jersey serving the seashore resorts, the rail traffic having declined to such an extent that the

continued maintenance of the separate lines was unprofitable.

In such a unification other carriers might conceivably be adversely affected and they have the right to appear before the Commission in opposition to the granting of the application, but where the Commission finds the proposal to be in the public interest it has authority to permit the arrangement notwithstanding the opposition or lack of assent by other carriers. Cf. *Atlantic Coast Line* v. *United States,* 284 U. S. 288, *New York Central Securities Co.* v. *United States,* 287 U. S. 12.

The argument that the phrase "if assented to by all the carriers involved" would be mere surplusage if limited to the parties to the agreement, since they must necessarily have assented thereto, overlooks the words of the section under which the Commission may institute the proceeding *upon its own initiative.* If a situation were called to the Commission's attention where it appeared that a pooling arrangement would save competitive waste or would otherwise be desirable in the public interest, the Commission, in order to encourage the carriers to effect the arrangement, could institute a proceeding upon its own initiative. But it could not make an order requiring the carriers to pool; and the assent of the carriers involved would be a condition precedent to an order of approval and authorization. A prior agreement between or among the carriers is not essential. The words

"upon the application of any carrier or carriers" indicate, too, that the proceeding may be instituted upon the application of a single carrier. In that event the assent of the other carrier or carriers involved would have to appear affirmatively, as a condition to an order.

That the words "if assented to by all the carriers involved" are merely words of limitation upon the Commission's authority was held by the Commission in *Fifteen Percent Case, 1931,* 179 I. C. C. 215, 218. In that proceeding there was a proposal to pool the earnings of a large number of carriers, but it developed that an agreement to adopt the proposal could not be obtained, and the Commission held that "in the absence of such an agreement" it "had no authority to require such pooling." A similar holding was made in *Securities and Acquisition of Control of Railway Express Agency,* 150 I. C. C. 423, 435.

The cases cited by appellant do not support its suggested interpretation. *In re Pooling Freights,* 115 Fed. 588, merely reports the charge to a grand jury by the District Judge for the Western District of Tennessee on May 26, 1902. It quotes the original section 5 forbidding pooling, quotes the definition of the word "pool" in the Century Dictionary, and explains the application of the section as it then stood. It does not construe the permissive proviso added in 1920, and nothing said would indicate that appellant is a "carrier involved" within

the meaning of the proviso. It would indicate to the contrary. If the Milwaukee and the North Western had put their pooling agreement into effect without the Commission's approval they would have been subject to indictment, but it is difficult to perceive wherein appellant would have been criminally liable, since it is not a party to the pooling agreement and none of its traffic or earnings is included in the pool.

The irrelevancy of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, is shown by a fuller quotation than given in appellant's brief:

> As to the so-called Temple Iron Company contracts: It appears that in 1889 certain operators in the anthracite coal region organized a competing railroad, with a view to carrying their product from the coal regions to market at tidewater. It became evident that this company was likely to succeed, and to construct a competing railroad from the coal fields to the sea. With a view to acquiring its property, five of the leading railroad carriers purchased the collieries whose proprietors were developing the new scheme. * * * This ended the building of an independent line, and the transportation of coal from the collieries is distributed among the carriers interested.
>
> It is argued that these contracts, if given in evidence, will tend to show a pooling of freights, in violation of the fifth section of the commerce act. While this testimony may

> not establish such an arrangement as is suggested, it has, in our opinion, a legitimate bearing upon the question. There is a division of freight among several railroads, where, by agreement or otherwise, the companies have a common interest in the source from which it is obtained. Furthermore, we think the testimony competent as bearing upon the manner in which transportation rates are fixed, in view of determining the question of reasonableness of rates, into which the Commission has a right to inquire. (Pages 46-47.)

Appellant cites *Western Pacific* v. *South. Pac. Co.*, 284 U. S. 47 and *Claiborne-Annapolis Ferry Co.* v. *U. S.*, 285 U. S. 382, in support of its suggestion that the words "carriers involved" as used in section 5 (1) have virtually the same meaning as the words "any party in interest," as used in section 1 (20) giving such party the right to sue to enjoin any construction, operation, or abandonment contrary to the provisions of paragraphs (18) or (19). In the first of these cases the single question decided was that the Western Pacific was a "party in interest" within the meaning of section 1 (20) and therefore entitled to maintain a suit to enjoin the Southern Pacific Company, a competitor, from extending its line without having first obtained a certificate of public convenience and necessity from the Commission; and the Court, after pointing out that in *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry.*

Co., 270 U. S. 266, it had declared paragraphs 18 to 22 of section 1 "to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities," said:

> If, as the court below seems to have assumed, a "party in interest" must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation.

A like consideration obtains here. In the *Claiborne-Annapolis* case it was held *inter alia* that the ferry company had the right to maintain the suit under the Urgent Deficiencies Act to enjoin and set aside a Commission order authorizing the Chesapeake Beach Railway Company to extend its line by means of a ferry across Chesapeake Bay, which would compete with the ferry company.

If the Milwaukee had attempted to abandon operations under its trackage rights over appellant's line without first having obtained a Commission certificate, appellant would no doubt have been a "party in interest" within the meaning of section 1 (20) entitled to sue to enjoin the abandonment. But it does not follow that appellant is a carrier involved in the pooling with the absolute right by merely withholding its assent to prevent the Milwaukee and the North Western from effectuating the

plan, though authorized and approved by the Commission. The words "if assented to by all the carriers involved," as used in section 5 (1) obviously have a different meaning and purpose from the words "any party in interest," as used in section 1 (20), and decisions construing the latter words seem inapposite here.

Appellant argues (brief, pp. 32–33), that it is a carrier of the ore traffic because it "furnishes the roadbed and track and performs the dispatching and signaling services controlling the movement of the trains and that "by controlling and regulating the movement of trains in interstate transportation, as well as furnishing and maintaining the 'railroad', *i. e.*, the instrumentalities and facilities of transportation," it is performing the functions of a carrier as much as if its cars and engines also were used. This factual statement is inaccurate. Appellant owns the railroad. By contract it has granted the Milwaukee the right to use it principally for the transportation of the ore traffic in the cars of the Milwaukee pulled by Milwaukee locomotives and manned by Milwaukee employees. In this sense it "furnishes" the roadbed and track but it does not furnish those facilities to the shipper; it furnishes them to the Milwaukee and for this it is compensated by the Milwaukee at the terms stipulated in the contract. Appellant receives no compensation from the shipper; it has no dealings with the shipper, and is not a party to the Mil-

waukee's rate covering the transportation of the ore from mines on the line of the Milwaukee in the Menominee Range to Escanaba. Nor is it quite accurate to say that the appellant "performs the dispatching and signaling services controlling the movements of the trains." For the contract shows that the Milwaukee pays its proportionate share of the expenses of these services. The second article, paragraph (g) provides:

> That expenses of operation shall, for the purpose aforesaid, include such proportion of the salary of the General Manager of said railroad, the wages of the road master, superintendent and *train dispatchers* thereon, as may be agreed upon by the General Managers of the respective Companies and such proportion of the wages of such *telegraph operators, switchmen, flagmen and other employes* of the Escanaba Company as said St. Paul Company [Milwaukee] shall use in the transaction of its business, * * *. (R. 400.)

The Milwaukee also bears its proportionate expense of maintaining the railroad, including "the cost of any and all material and labor necessary to preserve, repair and renew the roadbed, rails, ties, switches, railroad crossings, water stations, fuel stations, bridges, culverts, cattle guards, fences, highway and farm crossings, crossing signs and gates, *signal posts* and *telegraph line* and any and all other appurtenances of and pertaining to the

premises," the use of which is granted by the contract. (Article second, paragraph (f), R. 400.)

The Commission's report finds that the average annual payment of the Milwaukee to the appellant on account of the trackage rights on the ore traffic was $181,226 for the 10-year period from 1923 to 1932 and $79,555 for the 5-year period from 1931 to 1935, and that:

> The detailed items included in these payments are maintenance of way and structures; transportation other than train; taxes; amortization and interest on additions; current betterments; and such amounts of rental as the pro rata proportion of the use of the line of the Escanaba Company bore to the number of miles run by the cars and engines of both companies operating over the tracks of the Escanaba Company, during each year, subject to a minimum rental of $27,000. (R. 13.)

By the contract it was further agreed (Article fourth, paragraph (a), R. 403) that "all the employes of the Escanaba Company, except engine men and train men, engaged in maintaining, repairing and operating said premises, or any of them, shall, for the purposes of this contract, be deemed and taken to be the joint employes of both parties hereto."

The contract further stipulates (Article first, paragraph (c), R. 396) in reference to the iron ore traffic "that all such business shall be tendered to

and carried by the St. Paul Company, * * *."

It thus appears that factually and legally the Milwaukee is the carrier of the ore traffic.

Union Pacific Railway Company v. *Chicago, R. I. & P. Railway,* 163 U. S. 564 and *Chicago, Rock Island & Pacific Railway Company* v. *Denver & Rio Grande Railway Company,* 143 U. S. 596, cited by appellant, do not hold that a railroad company granting trackage rights to another railroad company is the carrier of the traffic transported over its line by the grantee. The *Union Pacific* case was a suit by the Chicago, Rock Island & Pacific against the Union Pacific for specific performance of a contract under which the Union Pacific granted trackage rights over its line between Council Bluffs, Iowa, and Omaha, Nebr., to the Rock Island. One of the principal defenses was that the contract was *ultra vires.* This was overruled and the judgment of the lower court in favor of the plaintiff was affirmed in this Court. *Chicago, Rock Island & Pacific Ry. Co.* v. *Denver & Rio Grande, supra,* was a suit by the former to enforce an alleged right to certain of the terminal facilities of the D. & R. G. at Denver, claimed to have been granted as part of a contract giving the Rock Island trackage rights over the D. & R. G. between Denver and Pueblo, Colo. These cases do not support appellant's contention but on the contrary indicate that the carrier having a trackage right is the actual carrier of the traffic transported

by it over the road of the proprietary company. Cf. *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475; *Linstead* v. *Ches. & Ohio Ry.*, 276 U. S. 28, 34–35.

The Commission has so treated the carrier operating under trackage rights for purposes of demurrage charges, car furnishing, enforcing equality of service and rates, avoidance of discrimination, and, generally in the administration of the Interstate Commerce Act, in the same manner as though the carrier, instead of acquiring the trackage rights, had extended its own rails. *Cedar Hill Coal Co.* v. *A., T. & S. F. Ry. Co.*, 15 I. C. C. 73, 75, 77; *Ridge Coal Mining Co.* v. *M. P. R. R. Co.*, 62 I. C. C. 259, 261; *Penick & Ford* v. *Director General*, 61 I. C. C. 173, 176; *Huerfano Coal Co.* v. *C. & S. E. R. R. Co.*, 41 I. C. C. 657, 659.

Section 1 (3) of the Act defines the term "railroad" as including, among other things, "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease."

In *Transit Commission* v. *U. S.*, 289 U. S. 121, this Court held that the extension of the traffic of an interstate carrier beyond its own terminus over the line and to and from the terminus of another carrier, under a trackage agreement allowing it the use of these facilities jointly with the owner, is an "extension" of the railroad of the lessee or licensee and "operation of a line of railroad" by

it, within the meaning of section 1 (18) of the Interstate Commerce Act. After stating that for more than a score of years the Long Island had used the lines of the Pennsylvania for the passage of frequent trains carrying an enormous and ever increasing traffic between the terminus of its owned railroad at Sunnyside and the Pennsylvania station, the Court said:

> It is no stretch to say that it has been operating such lines or that they constitute an "extension" of its own railroad. (Pp. 128–129.)

As to the pooling of the earnings on the class and commodity traffic. This pooling "is merely incidental to the pooling of the ore traffic," for the reason that there would be no occasion for the provisions of the contract relating to the division of earnings on the general traffic if there were no pooling of the ore traffic.

Paragraphs 52 to 55 of the pooling agreement (R. 338–339) relate to interchange of traffic with appellant and cover the pooling as between the Milwaukee and the North Western of their earnings on this traffic. It was explained in the testimony that these provisions were inserted in the contract as protective measures to the Milwaukee (R. 143–144; 175–176; 282). It was feared that the traffic now interchanged between appellant and the Milwaukee might shift over to the North Western through Escanaba and as a consequence the Mil-

waukee would lose the revenue it now earns upon such traffic. (R. 143.) For example, an unrouted shipment originating on appellant's line destined to Milwaukee, Wis., if hauled by appellant to Channing and there interchanged with the Milwaukee, would move over the latter line to destination, but the appellant could route the shipment via Escanaba and the North Western (and apparently obtain the same division of the joint rate as it would obtain if it sent the shipment via Channing). (R. 144.) The Milwaukee would also lose this business if the western part of appellant's line were abandoned and the only connection between appellant's line and the Milwaukee thereby broken. (R. 18, 282–284.) If the Milwaukee should lose all the traffic now interchanged with appellant at Channing, it would nevertheless, under paragraph 52 of the agreement, get the revenue on the traffic, based on the 6-year experience, as though the business had actually moved over that route. (R. 282.)

As found by the Commission this pooling as to the general traffic, which is a pooling only of the North Western's and Milwaukee's earnings thereon, would in no way affect the earnings of the appellant on this traffic or its services to the public, so long as traffic originated at, or destined to, points on the appellant's line is handled as at present. At the present time appellant gets certain revenue on this traffic; that is not to be disturbed. The Milwaukee and the North Western also get

certain revenue, and they are going to put that revenue in a pool and divide it on the basis provided for in the contract. This arrangement cannot affect the earnings of appellant.

From the fact that appellant participates in the transportation of this traffic it does not follow that it is a carrier involved in the pooling when as a matter of fact it is not so involved, since its earnings are not to be affected, and the pooling of the earnings is to take place only as between the Milwaukee and the North Western. The record shows that traffic moves to and from points on appellant's line via the North Western and the Milwaukee to and from various sections of the country. (R. 308.) If appellant were to be deemed a carrier involved because it is a participant in the traffic, then all carriers which participate in the traffic, whether they are far or near, would likewise be carriers involved and their assent would be necessary. The revenues of carriers other than the Milwaukee and the North Western are untouched by this pool and, under a reasonable construction of the statute, the assent of such other carriers is unnecessary.

Baltimore & Ohio R. Co. v. *United States* (*Chicago Junction Case*), 264 U. S. 258, is not relevant here. This case is cited by appellant at brief page 36 following a vague assertion regarding interchange of traffic and apparently appellant seeks to intimate that it will be subjected to some disadvantage in this respect. There is nothing whatso-

ever to show that the pooling order will interfere with or restrict the facilities for interchange of traffic as between either the North Western or the Milwaukee and the appellant. The ore traffic has never been interchanged with appellant. It has been transported by the Milwaukee from the mines to the docks at Escanaba, moving, it is true, over the line of the appellant from Channing to Escanaba, but not carried by appellant. The carrier was the Milwaukee and its right of operation over the rails of the appellant, granted to it by contract, in legal effect made appellant's rails the railroad of the Milwaukee so far as the ore traffic was concerned. The Milwaukee's trackage right gave it no authority to do a local business at stations on appellant's line. Outbound traffic from such stations and inbound traffic to such stations was and is interchanged as between appellant and the Milwaukee at Channing and as between appellant and the North Western at Escanaba, and there is nothing whatever to show that this interchange or the facilities therefor will be diminished or altered in any way. Traffic participated in by either the Milwaukee or the North Western, consigned to points on appellant's line, must necessarily be turned over to it for transportation, either at Escanaba or Channing, as there is no other line than the appellant's at either Escanaba or Channing to which the North Western or the Milwaukee could deliver such traffic.

Appellant speaks of loss of bargaining power (br., p. 36). This must refer to divisions of joint rates with the Milwaukee and the North Western. But there was and is no proposal to change any of appellant's divisions of joint rates, and, of course, it has the protection in this regard of section 15 (6) of the Interstate Commerce Act under which it may file complaint with the Commission against any alleged unjust or inequitable divisions of joint rates. *New England Divisions Case*, 261 U. S. 184.

(a) The purpose of section 5 (1), as amended by Transportation Act, 1920, was to encourage pooling arrangements as aids in the development of adequate national transportation service. The provision is therefore entitled to a liberal construction

As stated by the Commission in its 1918 Annual Report, page 5, "The railroads of the country came into being under the stimulus of competition. From the outset their operation and development have been responsive to competition which has grown with the growth of population and industry. This competitive influence has been jealously guarded and fostered by State laws and constitutions as well as by the Federal law. * * * Out of competition grew rate wars, pooling, mergers, and consolidation into systems, as well as the rebating and other preferential treatment of shippers which the Act to regulate commerce was primarily framed to prevent."

In the original act Congress, accepting the competitive principle as salutary, unqualifiedly pro-

hibited pooling,[7] and that provision remained unchanged until the passage of Transportation Act, 1920.

In its 1919 Annual Report the Commission recommended that there should be provision, among other things, for "Merger within proper limits of the carriers' lines and facilities in such part and to such extent as may be necessary in the general public interest to meet the reasonable demands of our domestic and foreign commerce." It was thought that "it might become necessary or be found desirable in the public interest to permit, encourage, or require carriers within limits as to extent, territory, and time to merge their lines and facilities or the operation thereof." In the event of the continuance of the policy of private ownership and operation under governmental regulation, the Commission was of the view that seven matters required legislative consideration, the first of which was, "Revision of limitations upon united or cooperative activities among carriers by rail

[7] Section 5 of the original Act, in a single paragraph, provided as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

and by water." Discussing this subject, which embraced among other things the pooling of traffic, facilities, and earnings, the Commission said (page 4):

> Under the policy heretofore followed by our Government all efforts to restrict the full play of competition between carriers have been frowned upon or prohibited. Obviously competition between carriers that is wasteful or unnecessarily expensive lays an added burden upon the ratepayers. Elimination of wasteful or unduly expensive competition in rates or service is desirable and under the exercise by the Government of its power to regulate the service and the rates which the carriers may charge and to require an abatement of all unjustly dscriminatory, unduly prejudicial, or unduly preferential charges, regulations, or practices, carriers might well be permitted and encouraged to coordinate their activities and merge or consolidate their lines to such an extent as is, after thorough investigation and full hearing, sanctioned by the regulating body. * * *. If, without unduly lowering or restricting the standard of service, economy in maintenance and operation can be secured by cooperative agreement or consolidation, under governmental supervision and approval, of two or more lines, the public is not injured, while the sum available for improvements and betterments of the carrier properties is augmented."

A bill having been drafted embodying these recommendations, Commissioner Clark, speaking for the Commission, appeared before the committee and explained its provisions. A quotation from his statement dealing with the matter of pooling and the related matters of consolidations, mergers and acquisitions of control, is printed in the margin.[8]

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[8] Mr. Clark. * * * The present act, as is well known, in this paragraph prohibits any form of pooling of freights or the earnings upon freights. Experiences had during the war have led to the conviction that this provision is not necessarily in the public interest, and this bill, therefore, proposes that, under regulation and with approval of the commission, there shall be relaxation of those limitations upon the activities of the carriers.

The amended section starts out with the rule:

"That, except upon specific approval by order of the commission as in this section provided, it shall be unlawful for the carriers to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing roads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof."

It then provides that the commission may, if after hearing it is of the opinion that the unification, consolidation, or merger by purchase, lease, stock control, or in any other way of two or more carriers subject to the act, or of the ownership or operation of their properties or of designated portions thereof, or that the pooling of their traffic, earnings, or facilities to the extent indicated by the commission, will be in the interest of better service to the public or economy in operation, or otherwise of advantage to the convenience and commerce of the people, the commission shall have authority by order to approve and authorize such unification, consolidation, merger, or pooling under such rules and

Following these recommendations section 5 was amended by the addition of the proviso, in par. (1), permitting pooling of traffic or earnings when found by the Commission to be in the interest of better service to the public, or economy in operation, and not unduly restrictive of competition; and the section was further amended by addition of

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regulations and for such consideration as the commission may find to be just and reasonable in the premises.

It then provides that the commission may from time to time, for good cause shown, make supplemental orders deemed necessary or appropriate and thereby modify or set aside provisions of previous orders as to the extent of pooling or as to the rules, regulations, terms, conditions, or consideration in respect of any unification or consolidation of operation, and not of ownership or of pooling, so previously approved and authorized.

It will be noted that this does not include any provisions for the commission by supplemental order to modify or set aside the provisions of a previous order which permits the merging or consolidation of the ownership of two or more properties, the idea being that if the ownership has been merged there has been a change of control and ownership of the securities and stocks of the reorganized property as compared with the previously existing properties, which could not by an order of the commission justly or perhaps lawfully be undone; but, except where there has been a change of ownership, the commission would be authorized by supplemental order to modify any previous order.

It then provides that carriers affected by any such order of the commission shall be, and are hereby, relieved from the operation of certain laws restricting their activities in that direction in so far as may be necessary to enable them to carry into effect any unification, consolidation, merger, or pooling so approved. * * *

This provision, Mr. Chairman, involves a substantial change in the governmental policy and would effect a sub-

comprehensive provisions for consolidations, mergers, and acquisitions of control. It was expressly provided (in par. (8), now par. (15), *infra*, p. 68), that any carrier which obtains an order from the Commission under any preceding provision of the section, including the provision in paragraph (1) relating to pooling, as well as the provisions relating to consolidations, mergers, and acquisitions

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stantial change in the policy of some of the States with regard to maintenance of every degree and feature of competition which is fostered by existing laws. It would make possible under private control and operation of the roads the utilization of many economies which would be possible under a unified control or the operation of all the roads as one system.

Two competing single-track lines between two important commercial centers might, under an arrangement made pursuant to this authority, be used as a double-track road for the carriage of through freight and for through-passenger service as well. Two single-track roads of that nature, or even a double-track road and a single-track road, one of which had adverse grades against the current of traffic and the other had them in the opposite direction, might be utilized to great economy by obviating the necessity of lifting the tonnage over the adverse grade. * * *.

There are many other considerations which move to the view that this would be a sound departure from present policy. Consolidations for operation and division of the traffic made under careful, reasonable, and open arrangements, approved by the commission, are not, as we think, antagonistic to the public interest, while it is to the public interest that every reasonable economy in operation shall be effected, because the expenses of operation must all be paid by the public. (Pages 19–21, "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Sixty-sixth Congress, 1st Session, on H. R. 4373.")

of control, shall be relieved from the operation of all antitrust laws, Federal and State. (These provisions were further amended and strengthened by Emergency Railroad Transportation Act, 1933, c. 91, 48 Stat. 211, Title II, pp. 217–220.)

It is thus clear that in enacting Transportation Act, 1920, Congress sought to obtain, as far as feasible and practicable, the advantages of unified control which governmental operation had demonstrated, by providing for pooling, consolidations, mergers, and acquisitions of control wherever, upon application of the carriers and after full hearing, it was found by the Commission that it would be in the public interest to do so.

Congress did not attempt to force either consolidations or pooling. With knowledge that in a great many instances the carriers would willingly consolidate or merge, or pool their traffic or earnings, Congress opened the way for them to do so, if the regulatory body found after examination that public interest would be furthered thereby, and encouraged such cooperative activities by removing the barrier of the antitrust laws.

In *Piedmont & Northern Ry.* v. *Comm'n.,* 286 U. S. 299, 311–312, this Court said:

> The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy in-

tended. *Spokane & Inland Empire R. Co. v. United States*, 241 U. S. 344.

Therefore, the pooling provisions of section 5 should be read in the light of the purposes sought to be accomplished by Congress. If they be read as appellant suggests, the end sought will not be accomplished. For if two or more carriers seeking to pool their traffic or earnings can be blocked by a third carrier, not a party to the pooling, but seeking to prevent the pooling for its own reasons, by the simple expedient of withholding its assent, it seems clear the purpose of Congress will be defeated.

II

The certificate authorizing the Milwaukee to abandon operation under trackage rights over appellant's line is a valid exercise of the Commission's authority under section 1 (18) and (19).

Appellant, though centering its attack upon the order authorizing the pooling, challenges the validity of the certificate authorizing the Milwaukee's abandonment of operation over its line under trackage rights.

Because of the fact that the North Western's docks at Escanaba were still in good condition, while the Milwaukee's docks were worn out (R. 180, 256); that the switching from the yards of the North Western at Escanaba to the docks is more convenient, expedient and economical than from the Milwaukee's yard (R. 118–119, 121–122); that

the North Western has two lines from Iron Mountain to Escanaba, which can be used as a double track railroad, one for the movement of the loaded ore cars, the other for the empties (R. 117), with sufficient capacity to handle the peak volume of traffic, whereas the Milwaukee's and appellant's lines are both single track (R. 117, 120, 121); that the grades over the North Western to Iron Mountain are more favorable than those over the Milwaukee to Channing (R. 121), and for many other reasons (R. 120–122, 160), it was decided to use the North Western exclusively between Iron Mountain and Escanaba for the movement of the pooled ore traffic, with the consequent abandonment by the Milwaukee of its trackage rights for ore movement over appellant's line.

But the Commission would not approve the pooling arrangement unless the Milwaukee filed an application for a certificate, so that all parties concerned would have the opportunity to contest it. The Milwaukee later filed such an application, and, in accordance with the provisions of section 1 (19), the usual notice to the Governor of the State was given, as well as notice by newspaper publication. (R. 27.) Thereafter a further hearing was held and various interested parties appeared and introduced evidence, which disclosed the facts in detail.

The appellant and the others who appeared in opposition to the granting of the application feared

that the abandonment of the use of the appellant's line by the Milwaukee for the ore transportation would jeopardize appellant's revenues to such an extent as to lead to the abandonment of its line or a part thereof.

Upon the record presented the Commission found that the territory adjoining appellant's tracks is sparsely settled, (R. 16), the entire population along its line west of Escanaba being only 6,303 (R. 18); that the territory along its line was once heavily timbered but most of the heavy timber has now been cut out (R. 16), and while the territory has been settled by farmers to some extent, and small communities have sprung up near some of the stations—Ralph, Northland, and Watson each having about 75 to 80 people—the growth of agriculture has been slow (R. 16); that in 1935 the 18 intermediate stations on the line originated 46 carloads of potatoes, 5 carloads of sugar beets, 1 carload of hay and grain, 1 carload of machinery, and 544 carloads of forest products. (R. 16.)

The Commission also found other facts, including the total amount of freight carried by appellant during 1935 and preceding years, and its net income. (R. 16–17.) It was found that appellant's operations as a whole have been highly profitable, and no finding that its operations will become unprofitable after the Milwaukee abandons its operation over the line.

It was found that appellant paid 10 percent dividends in 1934 and 1935, and paid dividends aggregating 115 percent and paid off its entire funded debt during the period 1923–33.[88] (Report, R. 17; R. 308–309; Ex. 32, R. 374–A.)

The Commission made further findings indicating that even though the Milwaukee had bandoned its ore train operation over appellant's line in 1930, appellant would still have made profits in the 5-year period 1931–35. The report (R. 17) finds:

> The Escanaba Company has undertaken by exhibits to adjust its income statement for 1934 and 1935 to indicate the effect of abandonment of operation by the Milwaukee over its line. These adjustments include in operating expenses proportions paid by the Milwaukee, and exclude from non-operating income all sums received from the Milwaukee as joint-facility rents. On this basis it is calculated that, without the support received from the Milwaukee for use of its line under the trackage agreement in the years 1931–35, the Escanaba Company would have sustained losses amounting to $61,893, $36,220, $5,548, $9,448, and $5,653, respectively. These calculations do not take into consideration the payments which the Milwaukee would have continued to make under the agreement had the proposed aban-

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[88] As shown by Exhibit No. 32, the dividends were 10 percent in 1925, 1928, 1929, 1930 and 1932; 15 percent in 1926 and 1927, and 5 percent in 1923, 1924 and 1931.

donment of operation occurred at the end of 1930, or the possible savings in the expense of maintenance had the Milwaukee's ore trains ceased to operate over the line subsequent to that year.

The aggregate losses thus estimated by appellant aggregated $118,762 during the 1931–35 period. But the Milwaukee's minimum payment under the contract, amounting to $27,000 a year (R. 143, 168, 254, 272, 338), would have totaled $135,000 [sb] during this 5-year period, so that appellant would have earned at least $16,238, plus the amount it could have saved by reduction in maintenance expenditures due to the absence of the movement of the Milwaukee's heavy ore trains over its line.

As stated in the report (R. 17) a witness for the Milwaukee, experienced in the study of the earning capacity of system branch lines, expressed the opin-

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[sb] Plus certain amounts for amortization of past additions and betterments, approximating $1,234 per annum. See Par. 51, pooling contract, Exhibit No. 1, R. 338, and Par. 2, trackage right contract, Ex. F–1–A, R. 397.

Under the 1921 contract the value of the appellant's road was deemed to be $900,000, and the fair rental value of the road 6% of the total value, or $54,000 a year. This rental value was to be apportioned between the appellant and the Milwaukee on a usage basis, that is to say, the Milwaukee was to pay to appellant for the use of its road such proportion of $54,000 as its traffic over the road bore to the total business (spoken of as the wheelage basis) but never less than one-half, or a minimum amount of $27,000. Under the contract, the Milwaukee must pay this amount to appellant even though it makes no use whatever of the road. (R. 13, 35, 254, 256, Ex. F–1–A, R. 401.)

ion that the appellant can continue operation for years by virtue of economies in maintenance expenditures and reduced train service, and that, if and when further relief were needed, the portion of its line from Channing to Northland, 27.5 miles, might first be abandoned and the remainder operated, on a self-sustaining basis, as a branch from Northland to Escanaba and Wells. (R. 311–312.)

But there was no proposal to abandon any of appellant's operations or any part of its line, and it would not be possible to draw any definite conclusion upon the present record whether in the future any such abandonment would be necessary. There was no finding that any part of appellant's line or operations must or should be abandoned.

It was found that the Milwaukee is in a deplorable financial condition, having sustained net losses aggregating almost $90,000,000 during the 1930–35 period (R. 14; Exhibit 7, R. 354; Ex. F–4, R. 411–412), and that it could effect substantial economies through the ore pooling arrangement involving abandonment of its ore traffic operations over appellant's line.

It was therefore necessary for the Commission to weigh the economies to be effected by the pooling arrangement against the effect of such abandonment upon appellant's revenues. It found that—

> The Milwaukee and the North Western cannot be required to continue the service embracing the line of the Escanaba Company

> merely because of the undesirable effect of the discontinuance thereof upon the revenue of that company. (R. 19.)

Its conclusion was that public convenience and necessity permitted the abandonment and accordingly it issued the certificate.

It should be noted that the Commission did not attempt to adjudicate the rights of the parties to the trackage contract. In its first report, it said:

> The question of the cancellation of the lease is not before us. The rights and obligations of the parties under the contract is a matter for the courts to determine. (R. 37.)

Cf. *Central New England Ry.* v. *Boston & Albany R. R.*, 279 U. S. 415.

The court below, too, declined to pass upon the rights of the parties under that contract. It said (opinion, R. 424–425):

> It is important to observe that the abandonment authorized by the Commission does not relate to usual and ordinary railroad operations. It is limited to the discontinuance of operations by the Milwaukee Railroad under a contract for trackage rights relating principally to the transportation of iron ore. Continuance by plaintiff of operation by [of] the railroad is in no way limited. The trackage contract confers only a privilege.[9] It does not obligate the Mil-

[9] The contract, Exhibit F–1–A, R. 393, 395, provides:

"That the St. Paul Company [the Milwaukee] *may* at all times run its freight trains, manned by its own crews, over

waukee to make any use of plaintiff's track. The pooling arrangement approved by the Commission enables the Milwaukee to effect substantial economies which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually. Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right.

Although *Colorado* v. *United States,* 271 U. S. 153, deals largely with the question of conflict between federal and State authority over abandonments, its reasoning is equally applicable and controlling in the case of abandonments in purely in-

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and upon the premises aforesaid for the following purposes, and none other, viz: * * *." [*Emphasis* supplied.]

Nor did the Milwaukee guarantee any particular tonnage. It did agree that the annual rental for the use of the tracks should not be less than $27,000, regardless of the tonnage. (R. 401.) In 1932, when the tonnage was light, the rental, $27,180, was almost at the minimum. (R. 256.) If during any year its tonnage was so small that its proportionate amount of the rental figured less than $27,000, the only penalty was the payment of the minimum rental.

terstate operation, as here. In explaining the nature of the power exercised by the Commission in authorizing abandonments, the Court said, pp. 162–163:

> The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

Since the substantial economies which the Milwaukee will be able to effect as the result of the pooling arrangement with the North Western cannot be availed of if it is compelled to continue operation over appellant's line, the required continuance of this operation would place an undue burden upon interstate commerce, as definitely as would the continued operation of an unprofitable intrastate branch line. Where the line or branch to be abandoned is intrastate, the Commission must weigh the benefit to interstate commerce against the inconvenience and loss to which the other will thereby be subjected. *Colorado* case, 168. "Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. Compare *Proposed Abandonment by Boston & Maine R. R.*, 105 I. C. C. 13, 16. The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate." (*Ibid.* 168.) Further, in the *Colorado* case, the Court said:

> In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases, al-

> though the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier. The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the Act does not make issuance of the certificate dependent upon a specific finding to that effect. (Pages 168–169.)

And the Court said (168)—*"The sole test prescribed is that abandonment be consistent with public necessity and convenience."* [Italics ours.]

This is also the test as to abandonment of operation under trackage rights. *Transit Commission* v. *United States,* 289 U. S. 121. It governs in the case at bar.

There is before the Court the case of two of the

country's important railway systems, both in the hands of trustees under the Bankruptcy Act, which have failed to earn a reasonable return and have operated at large deficits. As found in the Commission's report (R. 14) the Milwaukee during the last six years (1930–1935) has sustained net losses aggregating upwards of ninety million dollars.[10] In order to effect economies in their operations these carriers have agreed to pool certain of their traffic, as a result of which the Milwaukee will obviate the necessity of spending $1,000,000 for the construction of a new dock at Escanaba and the two carriers will save approximately $200,000 annually in economies that can be figured in dollars and cents and will save other substantial amounts that cannot be reduced to figures.

It is clear, therefore, that this pooling, effecting as it will substantial economies in the operation of important interstate carriers, is of national concern, and that the putting into effect of these economies is in the public interest.

The Commission's certificate permitting the abandonment is therefore a valid exercise of the authority conferred upon it by the Act.

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[10] Detailed figures are given in Exhibits Nos. 7 and F–4. The North Western has also sustained heavy net losses, as follows: 1931, $6,034,125; 1932, $11,216,820; 1933, $7,875,419; 1934, $8,276,194. Exhibit No. 9 (original exhibit not printed.)

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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FEBRUARY 1, 1938.

APPENDIX

The Interstate Commerce Act (U. S. C., Title 49) provides:

SECTION 1

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the contruction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings.

Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any

party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 5 [1]

(1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commis-

[1] The Emergency Railroad Transportation Act, 1933, approved June 16, 1933, made numerous amendments to section 5 of the Interstate Commerce Act which have been carried into the following statement of the text. Secs. 201–208 of the Act cited.

sion, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

(2) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

(3) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission

is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest.

(4) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

(b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also

such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

(5) Whenever a corporation which is not a carrier is authorized, by an order entered under paragraph (4), to acquire control of any carrier or of two or more carriers, such corporation thereafter shall, to the extent provided by the Commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a common carrier subject to the provisions of this part, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a "carrier" as such term is defined in paragraph (1) of such section, and be treated as such by the Commission in the administration of the paragraphs specified. In the application of

such provisions of section 20a in the case of any such corporation the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance by each carrier which is under the control of such corporation of its service to the public as a common carrier, will not impair the ability of any such carrier to perform such service, and is otherwise compatible with the public interest.

(6) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (7), the words "control or management" shall be construed to include the power to exercise control or management.

(14) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (1), (4), (10), or (11), as it may deem necessary or appropriate.

(15) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section

1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by such order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 415

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR HENRY A. SCANDRETT, ET AL., INTERVENING DEFENDANTS, APPELLEES.

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THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Opinions Below.

The decision of the specially constituted District Court (R. 422) is reported in 21 Fed. (Supp.) 151. The first report of the Interstate Commerce Commission (R. 33), *Pooling of Ore Traffic in Wisconsin and Michigan,* is reported in 210 I. C. C. 599. The second report (R. 7), *Pooling of Ore Traffic in Wisconsin and Michigan,* is reported in 219 I. C. C. 285. This latter report and the decision of the specially constituted District Court are set forth in the appendix to this brief.

Statute Involved.

Section 5 (1) of the Interstate Commerce Act reads as follows:

> "That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises."

Questions Presented.

The controversy involves the validity of an order of the Interstate Commerce Commission, authorizing the pooling of interstate ore traffic from the Menominee Range in Michigan and Wisconsin, to Escanaba, Michigan, and division of earnings on class and commodity traffic to and from points on the lines of the Escanaba and Lake Superior Railroad Company. In appellant's brief, the issues have

been narrowed down until substantially the only question for determination is:

Whether appellant is a "carrier involved" in the pooling agreement within the meaning of Section 5 (1) of the Interstate Commerce Act.

Statement of the Case.

There is no inconsistency between the findings of fact made by the specially constituted District Court and the facts as found by the Commission and recited in its report. For its statement of the case, appellant has adopted the findings of fact made by the Court below, except finding No. 14 and in addition thereto, sets out four paragraphs of additional statement, for which record references are shown. The intervening defendants, appellees herein, adopt the findings of the District Court and make the following additions to the case as stated by appellant, with reference to the page of the transcript of the record, from which such statements are taken.

(For convenience, the Chicago and North Western Railway Company, its Trustee and its wholly owned but separately incorporated subsidiary, the Escanaba, Iron Mountain and Western Railroad Company, will hereinafter be collectively referred to as "North Western", and Chicago, Milwaukee, St. Paul and Pacific Railroad Company and its Trustees will hereinafter be referred to as "Milwaukee".)

The contract between North Western and Milwaukee approved by the Commission, is identified as Exhibit No. 1 and is set out in full in the transcript of record. (R. 316-348.)

The ore tonnage handled by each of the two companies during the ten year period, 1923-1932, inclusive, was studied and it was concluded it would be fair to divide the pooled

revenue of the future on the basis it had actually been earned, in the ratio of their respective earnings during the study period. The North Western's proportion in that period was 66 per cent and the Milwaukee's 34 per cent. (R. 122.)

The operating expenses, other than as related to docks at Escanaba, such as maintenance expenses of pooled tracks on the range, mine service tracks and yards, maintenance due to use determined under A. R. E. A. formula, including facilities, locomotives and cars used in handling the ore and transportation expenses, both road and yard, will be pooled and divided upon the same percentages as used in dividing the ore revenue. (R. 160.) Dock operating expense, including depreciation charges and taxes, and all other expenses of maintenance, insurance, taxes, etc. will be divided 30.2 per cent to the Milwaukee and 69.8 per cent to the North Western, which was the ratio of their participation in the total ore tonnage handled over or through the docks by both roads, 1923-1932. (R. 161.) The Marquette Iron Ore Range is a separate and distinct range from the Menominee. The North Western's docks at Escanaba have been used for Marquette ore and Menominee ore, while the Milwaukee's docks have been used only for Menominee ore. (R. 135.) The relation of the tonnage from the Marquette Range to the total tonnage from both ranges during the same ten years was determined, and it was found that the ratio of Milwaukee's Menominee Range tonnage was 30.2 per cent of all tonnage from both ranges. This percentage was adopted as the basis of apportioning compensation for the use of the North Western docks, as well as apportioning certain expenses associated with ownership of docks. (R. 124.)

The rental basis of the contract currently in effect is

six per cent interest on the value of that portion of the road used by Milwaukee. This value was about $900,000, and gives a fixed fair rental of $54,000, of which the Milwaukee pays a wheelage proportion of the fixed amount, but the agreement provides that the Milwaukee's share shall at no time be less than fifty per cent, or $27,000 per annum. (R. 256.) The Milwaukee pays a wheelage proportion of maintenance of way, transportation, general expense, and certain additions and betterments. (R. 254.) So long as the contract remains in force, the Milwaukee will pay the Escanaba and Lake Superior minimum rental of $27,000 and amortized payments of additions and betterments of approximately $1,300 per annum, even though it does not operate over the line of appellant. (R. 254.)

The Milwaukee operated its ore trains over the line of Escanaba and Lake Superior Railroad from Channing to a point in the vicinity of Wells Junction. (Ex. 3.) (R. 350-B.) Under the agreement, it may handle company construction material in or out. It may not do intermediate business between Channing and Wells. It has no scheduled train service. It has no operation at all in the winter time, the operation being confined solely to the ore season. (R. 255.) The Milwaukee has no station or loading point on the Escanaba and Lake Superior Railroad.

The Milwaukee issues tariffs covering iron ore from the Menominee Range to stations in Michigan and Wisconsin. The Escanaba and Lake Superior Railroad is not a participating carrier in the ore movement or in the rates covering the movement of ore from points on the Menominee Range to the docks at Escanaba. (R. 233.)

The North Western tariff on iron ore, to which the Escanaba and Lake Superior is a party, shows the destination as Wells. That is iron ore going to the Delta

Chemical & Iron Company having a furnace located not far north of Wells and served exclusively by Escanaba and Lake Superior Railroad trackage. The rates shown in this tariff, in which the Escanaba and Lake Superior Railroad is a participating carrier, are the rates applicable only on ore which goes to that one industry. They are not shown as a participating carrier in the movement of iron ore from the range to the Escanaba docks. (R. 236.)

If the ore traffic should go off appellants' line, it would revert to the status of an ordinary branch line throughout that country, and there would be about the same traffic on it as on branch lines of the Milwaukee in the same area. (R. 240.) The minimum rental would always take care of the entire maintenance for the line from Wells Junction to Channing. (R. 241.)

The contract, Exhibit 1, which is the basis of the pooling agreement, sometimes called the "Pooling Plan", provides for pooling by North Western and Milwaukee of their earnings on traffic interchanged by each with the Escanaba and Lake Superior Railroad. Paragraph 52 of the contract, Exhibit 1 (R. 338), outlines the method by which the percentages to be used in dividing such earnings are to be determined.

For the six year period, 1927 to 1932, Milwaukee's net revenue on business interchanged with the Escanaba and Lake Superior Railroad was $766,645. The North Western's figure for the same period was $992,290, that is, general commercial business. There was no iron ore traffic in that. (R. 281.) These are the figures referred to in Paragraph 52 of Exhibit 1 (R. 338), and the ratio afforded will be used to divide the pooled revenues received by them from traffic interchanged by the Milwaukee and North Western with the Escanaba and Lake Superior Railroad. (R. 281.)

Exhibit F-16 (R. 422) shows earnings of the Escanaba and Lake Superior on traffic interchanged with the Milwaukee and North Western roads for the Year 1935. (R. 308.)

The Escanaba and Lake Superior operates its own railroad, originates and terminates traffic and interchanges with the Milwaukee and North Western Railroads. Neither railroad is breaking off its connection with the Escanaba and Lake Superior or terminating its interchange relations with them. (R. 128.) The advantage appellant has from ability to interchange with two railroads, it will continue to have, if the pooling arrangement is permitted. (R. 129.) Paragraph 53 was incorporated in the contract (Ex. 1) to save for Milwaukee, business that would be lost to it, if at some future time the North Western acquired the Escanaba and Lake Superior Railroad and there was no longer interchange between that railroad and North Western. In the Commission's plan of consolidation, the Escanaba and Lake Superior was allocated to the Milwaukee. The North Western has no ambitions to acquire the Escanaba and Lake Superior Railroad at the present time. This provision was inserted in the contract to protect the Milwaukee, so that, if at any future time the North Western purchased the Escanaba and Lake Superior, it would not cease to be obligated to pay Milwaukee the percentage of interchange referred to in Paragraph 53. (R. 144.)

Summary of Argument.

1. The contract, Exhibit 1 (R. 316), approved by the Interstate Commerce Commission and the District Court and sought to be set aside in this proceeding, deals with two entirely different classes of traffic and the provisions of the contract with respect to these two classes of traffic are quite unlike.

The first and principal class of traffic dealt with is iron ore traffic from the Menominee Range to the docks at Escanaba. With respect to this traffic, the contract provides not only for pooling of the traffic itself but pooling of the tracks over which the traffic passes, pooling of the locomotives which haul and cars which carry the traffic and pooled use of the docks at Escanaba through which the ore is delivered to boats for transshipment.

The second and minor phase of the contract deals with traffic interchanged by North Western and Milwaukee with the Escanaba and Lake Superior Railroad Company, appellant. This traffic is not pooled, nor is its routing or handling affected in any way or manner. The provision in the contract, Exhibit 1, with respect to division of earnings on this traffic is that the North Western and Milwaukee will divide the aggregate of their future earnings derived from this traffic, according to the ratio afforded by their respective earnings derived from this traffic for the six year period, 1927-1932.

It is agreed that the only question presented for determination is whether appellant is a *carrier involved* within the meaning of Section 5 (1) so that its assent to the arrangements provided for in the contract, Exhibit 1, was required before the Commission might entertain and approve the application presented to it by North Western and Milwaukee.

2. While the question here presented for the court's determination is, in its final analysis one of law, there are important facts of record, material to a sound conclusion on the law, which must be considered. Appellant's relation to the situation must be clearly understood. The Commission has conducted a hearing and made findings of fact with respect to appellant's relation to the issues presented and under repeated decisions of the courts the Commission's findings are conclusive if supported by substantial evidence. These findings are so supported.

3. The appellant is not a "carrier" of ore between the Menominee Range and the docks at Escanaba.

In Section 5 (1) of the Act, the terms "common carrier" and "carrier" appear apparently without any thought of distinction between the two terms.

The Commission made findings with respect to whether appellant is a carrier of ore or of the ore traffic between the Menominee Range and the docks. It found that the appellant never participated as a carrier in the ore traffic in the past. It found that appellant's status is that of a lessor of trackage rights to the Milwaukee. It found that appellant does not participate in this traffic as a carrier. These are findings of fact supported by substantial competent evidence and must be observed as a basis for the determination of the legal question whether appellant is a "carrier involved", with respect to the ore traffic, and whose assent to the contract, Exhibit 1, is required by the statute.

4. Appellant is not a "carrier involved" with respect to that portion or phase of the agreement, wherein the North Western and Milwaukee provide for a division upon an agreed basis of their earnings or divisions from traffic interchanged with appellant.

This traffic is not pooled. So long as the connection between Milwaukee and appellant at Channing remains, all

traffic interchanged by Milwaukee and North Western with appellant will move and be handled exactly as it has been in the past. Milwaukee's and North Western's aggregate earnings derived from traffic so handled will be divided as follows:

The road that handles the traffic will retain 30 per cent of its entire earnings, being its share of the joint rates thereon, and the balance will be divided according to the ratio heretofore stated as having been derived from the six year period.

5. There was no determination by the Commission and no finding by the District Court that the agreement approved by the Commission in its order of November 18, 1936 would necessarily bring about abandonment of any portion of appellant's line.

Throughout appellant's brief, it is assumed and stated that the institution of the Plan, approved by the Commission, will necessarily result in the abandonment of a considerable portion if not the major portion of appellant's line of railroad. There is substantial evidence in the record that such result will not follow if the Commission's findings and the decision of the lower court are sustained. With the elimination of the heavy ore traffic hauled by the Milwaukee over appellant's line, maintenance expenses would be greatly reduced and there is testimony by an experienced witness that the payments appellant will continue to receive under the contract, of $27,000 per year plus amortizations of certain additions and betterments amounting to about $1,300 a year, will take care of entire maintenance of appellant's line from Wells Junction to Channing. The contract by virtue of which Milwaukee has trackage rights over appellant's line has not been abrogated.

ARGUMENT.

The Appellant Is Not a "Carrier" of Ore Between the Menominee Range and the Docks of Escanaba.

In Section 5 (1) the terms "common carrier" and "carrier" appear and apparently without any thought of distinction between the two. A reading of the Section would seem to make it clear that the word "carriers" in the phrase "if assented to by all carriers involved" means carriers or common carriers engaged in the transportation of the property under consideration in any pooling proposition before the Commission. "Carriers involved" is the equivalent of the phrase "carriers engaged". The text "that whenever the Commission is of opinion after hearing upon application of any carrier, or carriers, engaged in the transportation of passengers or property subject to this part, or upon its own initiative" would seem to clearly indicate that only carriers who were engaged in the transportation of the freights proposed to be pooled with division of the revenues therefrom would be "involved" in any orders or authorizations which the Commission might find just and reasonable in the premises under consideration.

Operation by the Milwaukee has been carried on over the line of the appellant since about 1900. This right to so operate over appellant's line was instituted pursuant to a contract identified in the record as Exhibit F-1. This contract expired December 31, 1920, and a new agreement identified as Exhibit F-1-a (R. 393) was entered into between the parties. This second agreement, similar in most respects to the original contract, but providing for substantially increased rentals, runs for a period of thirty years and will expire by its terms on January 1, 1951. These

agreements provide for the movement of iron ore from the Menominee Range by the Milwaukee with its own trains, train crews and equipment over the appellant's line from Channing to a point in the vicinity of Wells Junction, whence the ore trains move through the Milwaukee's yards. There the ore cars are classified and then switched to the Milwaukee's docks. None of the ore has ever been handled by the trains or crews of the appellant company.

Rates covering the movement of the ore are contained in Milwaukee tariffs and the appellant is not now and never has been a participating carrier in the tariff rates covering the movement of iron ore from points on the Menominee Range to the docks at Escanaba.

In the movement of its trains over the appellant's line, the Milwaukee renders no service to any shipping or receiving points on that line. Its rights are limited to the movement of iron ore with its own trains and crews, the movement of materials that the Milwaukee may need in connection with construction of or repairs to its docks or yards at Escanaba and the right to move outbound, occasional loads of coal from coal docks at Escanaba to points beyond Channing. The Milwaukee's crews and trains perform no local common carrier service while on the property of the appellant.

For the right to use the appellant's tracks for the movement of ore, Milwaukee pays such pro rata proportion of $54,000 per year, as Milwaukee's wheelage is to the total wheelage over the tracks used, with the proviso that in no event shall the annual rent for any year be less than $27,000. The Milwaukee also pays a pro rata share of maintenance, operating expenses, taxes, and pays interest on cost of certain additions and betterments applied to the property used.

The Commission found that appellant's status as to the ore moving over its line was that of a lessor of trackage

rights to the Milwaukee and the District Court approved this finding. That finding is supported by substantial competent evidence; in fact, it would seem that no other finding could be sustained on this record.

Payment of rental by the Milwaukee to the appellant is based upon the number of cars that Milwaukee moves over appellant's line. It is not based upon the weight of the contents of the cars. The amounts paid to the appellant by the Milwaukee would in no way be affected by an increase or decrease in the rates provided for in the tariffs for the movement of ore from any of the mines on the range to the docks at Escanaba. While the amount paid the appellant by the Milwaukee for the use of appellant's tracks varied substantially from year to year, it varied only with the rise and fall in the volume of the traffic as compared to the rise and fall of the appellant's traffic.

In appellant's brief, page 5, second paragraph, appears the statement, "the ore traffic is an important source of income to the Escanaba and Lake Superior Railroad" and in the following paragraph appears the statement, "In addition to the ore traffic, the Escanaba and Lake Superior originates and terminates a considerable volume of general traffic".

These expressions are misleading, unless it is kept in mind that the phrase "the ore traffic is an important source of income", can apply only to the rent received by appellant from the Milwaukee for transporting iron ore over appellant's line and that this "income" is not freight charges paid appellant for handling traffic over its line, in its capacity as a common carrier. Furthermore the Escanaba and Lake Superior Railroad, so far as the record shows, does not originate any ore traffic. It terminates some ore traffic which comes down over the North Western line from the Marquette Range and is delivered to appel-

lant by the North Western at Escanaba for delivery to a furnace on appellant's line in the vicinity of Wells.

From the foregoing facts, it is asserted that appellant is not a "carrier" nor is it a "common carrier" in its relation to the ore traffic moved by the Milwaukee from points on the Menominee Range to Escanaba. It has no carrier relation to that traffic. As found by the Commission, the relation between the appellant and the Milwaukee with respect to that traffic is merely that of a lessor of trackage rights to the Milwaukee. In its opinion, the specially constituted District Court in approving this finding of the Commission said, "It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract, the Milwaukee, as lessee of trackage rights, is the sole carrier of this traffic."

In Ballentine's Law Dictionary a "carrier" is defined as a "transporter of passengers or freight." A "common carrier" is defined as "one who undertakes for hire or reward to transport the goods of such, as choose to employ him, from place to place."

> "Common carriers are such by virtue of their occupation and not by virtue of the responsibilities under which they rest." *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 376.
>
> "Who are common carriers is determined by the nature of the business carried on and not by the contract made respecting the liabilities which shall attend it." *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174.

In Century Dictionary Encyclopaedia "pool" is defined (6. (b)) as:

> "a combination of the interest of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public and distribute the profits of the business among themselves equally or according to special agreement. In this sense pooling is a system of reconciling conflicting interests and of obviating ruinous competition by

which the several competing parties or companies throw their revenue into one common fund, which is then divided or redistributed among the members of the pool on a basis of percentages or proportions previously agreed upon or determined by arbitration."

"Pool *v. trans.*—to put into one common fund or stock for the purpose of dividing or redistributing in certain proportions; make into a common fund; as to *pool* interests."

The frequent references in appellant's brief to the effect that its income or revenue will be adversely affected, if the pooling of iron ore traffic from the Menominee Range to the docks at Escanaba is permitted, would tend to give the impression, unless all of the facts surrounding the relationship between the appellant and Milwaukee are kept in mind, that appellant's income so referred to was earned by it as a "carrier" of the ore traffic. Such is not the case. It is true that the appellant's income received from Milwaukee's use of appellant's tracks varies from year to year, but the variation is brought about by the fact that the appellant is a landlord and the Milwaukee its tenant, and the lease provides a sliding scale of rent dependent on the extent of use by the lessee of the leased property.

In writing the lease for the use of its tracks by the Milwaukee, appellant considered variations in rental, due to variations that might occur from a reduced use by the Milwaukee, and fixed the minimum annual rental provision. It is now bound by that provision.

Appellant Is Not a "Carrier Involved" With Respect to That Part of the Agreement Between the North Western and Milwaukee (Exhibit 1), Whereby They Propose to Divide Their Earnings or Divisions on Traffic Interchanged With the Appellant.

This part or phase of the plan, approved by the Commission, is dealt with in Exhibit 1, paragraphs 52, 53, 54 and 55. (R. 338-339.) As repeatedly stated in the record, and as found by the Commission:

> "The Pooling Plan as to traffic other than the ore traffic is intended as an insurance to the Milwaukee of revenue, which is now derived from this traffic and which would be lost in the event of the abandonment of the Western portion of the line of the Escanaba Company, and is merely incidental to the pooling of the ore traffic." (219 I. C. C. 285, 294.)

The revenues derived by appellant on this traffic, which it interchanges with the North Western at Escanaba and the Milwaukee at Channing, will in no way be affected by the proposed pooling of Milwaukee's and North Western's earnings or divisions on such traffic so long as this traffic moves as at present, and the Commission so found. It must be borne in mind that there is no pooling of the traffic itself, no pooling of the facilities used in moving the traffic and there is nothing in this portion of the plan or agreement which in the slightest degree interferes with the routing, the division of earnings allocated to the appellant or the rates on the traffic so interchanged.

The revenues of the appellant earned on such traffic are its own and are derived from its divisions of total revenues on shipments originating and terminating on its own line and delivered to or received from the North Western and the Milwaukee at interchange points. Forwarders and receivers of freight located on the line of the appellant will

in no wise be affected in their privilege of routing traffic forwarded or received by them, nor will the freedom of the appellant to control the routing of such traffic, as originates on its line, in so far as it may have such right, be affected.

The revenues to be pooled on this traffic under paragraphs 52, 53 and 54 of the contract, Exhibit 1, are solely the revenues of the North Western and the Milwaukee and the revenues of the appellant on such interchanged traffic will remain unaffected and unchanged. The appellant now has no interest in the revenues earned by the North Western or by the Milwaukee on traffic which appellant interchanges with those lines. Its interest is limited to its agreed division of the entire revenue derived from any given shipment.

The Milwaukee is not now and never has been a competitor with appellant for traffic originating or terminating on appellant's line.

By virtue of the interchange with appellant at Channing, the Milwaukee is a competitor with the North Western for the handling of business originating or terminating on the line of appellant. The provisions of paragraphs 52-55 inclusive, of the contract Exhibit 1 (R. 338-9), were inserted for the purpose of preserving to the Milwaukee the revenue now derived from this interchange which would be lost in the event the connection at Channing was discontinued and the Commission so found. By paragraph 55 of said contract, the North Western agrees to join with the Milwaukee in establishing appropriate through rates and divisions for handling interline traffic over the North Western via Iron Mountain so as to permit the Milwaukee to continue handling business to and from industries served by the Escanaba and Lake Superior Railroad.

The purpose of paragraph 55 was to furnish the Milwaukee protection against the breaking of the channel through Channing by abandonment of any portion of the

Escanaba and Lake Superior, so that the Milwaukee could still continue to do business with the Escanaba and Lake Superior by virtue of a route via the North Western through Iron Mountain that would permit the Milwaukee to continue to participate in the handling to and from industries served by the Escanaba and Lake Superior Railroad on its line by having traffic, which the latter originated or terminated, routed via the Milwaukee at Iron Mountain instead of as at present, via the Milwaukee at Channing. The Escanaba and Lake Superior should still get about the same division on that business which would be so interchanged with the North Western at Escanaba. (R. 284, 285.)

The record shows that this feature of the plan was created for the purpose of preserving the competition that now exists between the North Western and the Milwaukee on business originating and terminating on the line of appellant. The basis of the division of Milwaukee's and North Western's earnings on such traffic was designed to preserve that competition by allocating to these respective roads 30 per cent of their earnings on such traffic plus their pool proportion of the balance. It was the belief of witnesses for North Western and Milwaukee that this arrangement would make it of advantage to each road to handle all the traffic it could secure in interchange with the appellant and would preserve to the Milwaukee the earnings which it now derives from traffic interchanged with appellant and which, absent this phase of the plan, would be lost to Milwaukee in event the connection at Channing between appellant's line and Milwaukee was discontinued.

The record makes clear that where a given shipment moves over the lines of several railroads on through rates, each carrier participating in the haul receives a certain proportion of the total revenue commonly referred to as its "division". In the handling of interline traffic, each

road's division of the through rate represents its own individual earnings, which are as much its own as if the shipment were one moving wholly between points on its own line. It is thus clear that the pooling by North Western and Milwaukee of their divisions could not in the slightest degree prejudice or affect the divisions of the appellant on such interchanged traffic. These divisions have long been established and will remain unchanged. The flow of such interchanged traffic, the freedom of its routing and the volume will not be affected in the slightest degree by the pooling of North Western's and Milwaukee's earnings therefrom.

We think the Commission correctly found that the appellant was not a "carrier involved" within the meaning and intent of Section 5 (1) of the Act, with respect to the earnings of North Western and Milwaukee on traffic interchanged with appellant.

To give Section 5 (1) the construction contended for by appellant and to hold that appellant is a "carrier involved" as to all class and commodity traffic interchanged between it and the North Western and Milwaukee, because the latter two propose a division of their own revenues derived from such traffic, would, we think, have the practical result of nullifying the statute, for, since as shown, a considerable portion of all interline traffic moves on through rates with established divisions, no pooling arrangement could ever be authorized by the Commission, unless practically all carriers in the United States assented thereto. The record shows (Ex. 21) (R. 366) (Ex. 21-a) (R. 367) that appellant's traffic is quite diversified and that it does generally the business of a common carrier. Exhibit F-16 (R. 422) shows that appellant's divisions on such traffic interchanged with Milwaukee and North Western are quite substantial. In connection with this exhibit appellant's ac-

counting witness testified that the statement represents the earnings of the E. & L. S. from interline traffic moving from the E. & L. S. to the Milwaukee and North Western and over those roads and their connection to distant east and west points. It includes no revenue from iron ore. The figures include all joint traffic of all classes moving from as well as to these two connections except inter-terminal switching. (R. 308.)

If appellant is to be considered a "carrier involved" in the disposition of North Western's and Milwaukee's divisions of earnings on traffic interchanged by them with appellant and moving on through rates, it would seem to follow that all other carriers, participating in such traffic and through rates, would also be "carriers involved". For example, assume that a shipment originates on the line of the appellant, is delivered to and moves via the North Western to Omaha, thence over the Union Pacific to Denver; at the same time a shipment originates on the Union Pacific at Denver, is delivered to and moves via the Milwaukee, Omaha to Channing, where it is interchanged to the appellant for delivery at Wells; on each of these shipments the Milwaukee and the North Western earned a division as would the Union Pacific and the appellant. If the appellant is a "carrier involved" in the pooling of the earnings (*i. e.*, divisions) of the North Western and Milwaukee, earned on said shipments, we see no reason why it must not necessarily follow that the Union Pacific is also a carrier involved since its relation to the two shipments is in principle exactly the same as that of the appellant.

Practically every carrier in the United States is a party to through joint rates with established divisions in effect between substantially all points in the United States on all class and commodity traffic which may move either frequently or only occasionally. A shipment of paper origi-

nating on the line of appellant may move on a joint rate over half a dozen lines to some point in Florida; a shipment of watermelons may originate in Georgia and move on a joint rate over a number of lines, each with its established division for delivery by appellant to a point on its line; likewise with a car of oranges from California to a point on the appellant's line.

A large majority of all movements originating and terminating on appellant's line move over the lines of the North Western and Milwaukee, the two principal lines with which the appellant interchanges traffic and if appellant is "carrier involved" with respect to the disposition of Milwaukee's and North Western's divisions on this traffic, so is every other carrier that participates in the haul and receives a part of the through joint rate as its division. If the appellant's theory be correct, the Commission would be without authority to approve this portion of the Pooling Plan presented to it in the matter now under consideration unless such arrangements have not only the assent of the appellant but the assent of all other carriers who participated in the movements hereinabove described. It seems incredible that Congress should have intended any such requirement in the amendment of the Act of 1920 in Section 5 (1). We assert the logical interpretation is that placed upon it by the Commission in the order sought to be set aside and by the District Court's opinion and decision from which this appeal is taken.

In appellant's brief (pp. 33-34) reference is made to certain ore moving in carloads exchanged by appellant with North Western under joint rates applying thereon. This is ore which originates on the Marquette Range, see Exhibit 2 (R. 350-A), is brought down to Escanaba by the North Western, interchanged with appellant at Escanaba and by appellant delivered to one or more furnace com-

panies located in the vicinity of Wells which are served exclusively by Escanaba and Lake Superior trackage. It is not ore that goes to the docks and the appellant is not a party to any tariff covering or moving ore from any range to the docks at Escanaba. (R. 236.) No one would contend that appellant is not a carrier in every sense of the word with respect to that traffic from the Marquette Range, which terminates on its line, but to say that appellant is a "carrier involved", in what disposition the North Western makes of its division of earnings on said traffic, is placing, we think, a very strained construction on Section 5 (1) of the Act and, as above pointed out, would make it impossible as a practical matter for the Commission to approve any pooling arrangement between two carriers in a given area if they engage in interchanging through traffic with other railroads.

There Has Been No Determination by the Commission or by the District Court That Any Portion of Appellant's Railroad Will Be Abandoned as a Result of the Pooling Arrangement.

On page 19 of appellant's brief, it is stated that the result and effect of the pooling arrangement as approved by the Commission would necessarily be the abandonment of at least a considerable portion of appellant's line. Because of this asserted abandonment, it was argued that appellant's earnings will be affected and it will be relegated to the position of a switching line at Escanaba, with possibly a spur line to some point westerly of Escanaba; that to permit the Pooling Plan to become effective with such dire results would be inequitable and in total disregard of appellant's property rights.

A considerable amount of evidence was introduced at the hearings before the Commission bearing on whether the

Plan presented to the Commission, if approved, would or would not ultimately result in the abandonment of a portion of the line of the Escanaba and Lake Superior Railroad.

There was no finding or determination by the Commission or by the District Court as to whether abandonment of any part of appellant's line would or would not follow if the Plan became effective.

The record makes it entirely clear, however, that any diminution of appellant's income resulting from the Plan would be because of a reduction in the amount paid appellant by Milwaukee for the use of that portion of appellant's line, over which the Milwaukee has trackage rights. The record shows that over a ten year period, 1923-1932 inclusive, the average annual rental paid by Milwaukee to appellant for use of its tracks was $43,274. In addition the Milwaukee paid appellant proportions of maintenance and taxes and certain other expenses on the basis of the extent of the use as between the two companies.

With the elimination of the heavy ore traffic, maintenance expenses on the Escanaba and Lake Superior would be very markedly reduced as would all other expenses affected by movement of Milwaukee ore trains over appellant's line. So long as the trackage rights contract remains in effect, the minimum annual rental payment of $27,000 per year plus approximately $1,300 account amortization of additions and betterments will continue to be paid. Under the proposed Plan, the principal income loss to appellant would be in the reduced amount of rental paid by Milwaukee.

If, as found by the Commission and by the court, appellant does not stand in the relation of a "carrier" or "common carrier" to this traffic, then obviously it has no rights which will have been invaded if the Plan, as ap-

proved, becomes operative. As stated by the specially constituted District Court in its opinion (R. 425):

> "The trackage contract confers only a privilege. It does not obligate the Milwaukee to make any use of plaintiff's track. The pooling arrangement, approved by the Commission, enables the Milwaukee to effect substantial economies, which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff, depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually."

If appellant's relation to the ore traffic moving from the Menominee Range to Escanaba is not that of a carrier or common carrier, it must necessarily follow that appellant is not a "carrier involved", with respect to the pooling of that traffic, within the meaning and intent of Section 5 (1). Such being the case, its consent is not required and no legal right of appellant is invaded by the Pooling Plan. The contract (Ex. 1) does not require that Milwaukee move ore over appellant's line. It merely provides for certain minimum payments whether or not Milwaukee uses the line. As said by the court below:

> "Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The Court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right."

Purpose of Amendment of 1920 to Section 5 (1).

There is no equitable issue presented here for this court's determination. Prior to the Transportation Act 1920, Section 5 (1) made it unlawful for any carrier to enter into a contract, agreement, or combination with any other common carrier for the pooling of freights or division of their earnings. That part of the section beginning with the word "provided" was added by Transportation Act 1920.

On page 21 of appellant's brief appears the heading "The plain purpose of the Act is to prevent unjust and unreasonable pools" and then follows reference to Section 1 (4), Section 3 (3) and Section 15 (4), none of which paragraphs has any relation whatever to pooling freight or division of pooled earnings. This is self-evident from the references made in the several following paragraphs in the portion of appellant's brief referred to; in fact, as appellant states, "Each of these sections is directed against a specific practice and none of them would afford an efficient vehicle of escape from such an unjust situation as that in which the appellant is involved". Following this, it is argued that since these sections evidence a concern on the part of Congress for the individual interests of competing railroads, the provision in Section 5 (1), requiring the consent of carriers involved in pooling arrangements, was also dictated by the concern of Congress for justice and fairness.

This court has frequently considered the effect upon the Interstate Commerce Act of changes which were introduced by amendments contained in Transportation Act 1920. It has been stated frequently by this court that one of the primary purposes of the Transportation Act 1920 was the development and maintenance of an adequate National transportation service.

As has been noted, Section 5 (1), prior to 1920, absolutely prohibited pooling or division of earnings in any form or manner whatsoever and provided heavy penalties for infringement of the Act. The 1920 amendment permitted carriers, with the approval of the Commission, to engage in practices theretofore strictly forbidden. A case in which the purposes of Transportation Act 1920 are discussed at considerable length is the *New England Division case*, 261 U. S. 184.

In that case, opinion by Mr. Justice Brandeis, the court at p. 189 stated:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language.[6] And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range.[7] Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.[8] Upon the Commission, new powers were conferred and new duties were imposed."

Any pooling arrangement or division of earnings authorized by the Commission after hearing, supported by substantial evidence, meeting the provisions of the Section as correctly construed, may not, we submit, be properly termed an unjust or unreasonable pool. If, in approving such plan,

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7. "Among them are the establishment of the Railroad Labor and the Adjustment Boards. Title III, pp. 469-474; see *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board, ante*, 72; the provisions for raising capital, by new Government loans, § 210, pp. 468-9, by loans from the Railroad Contingent Fund (the recapture provision), § 15a (10, 16), pp. 490, 491; those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several states, § 439, pp. 494-496; the provision for consolidation of railways into a limited number of systems, § 407, pp. 480-482; provisions for securing adequate car service; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377; for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier, § 402, pp. 476-478; § 405, p. 479; §§ 412, 413, p. 483.

8. "Section 422, pp. 488, 489. To this end, also, the Commission was empowered among other things, to permit pooling of traffic or earnings, § 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines, § 402, p. 477; *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204; to fix minimum, as well as maximum, rates; and thus prevent cutthroat competition and the taking away of traffic from weaker competitors, § 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; and to determine the division of joint rates."

the Commission had acted outside the scope of its authority, or had erroneously construed the Section, a plan so approved might properly be termed unlawful; but if a pooling arrangement is properly approved by the Commission and complies with the requirements of the Act, and if, in the judgment of the Commission, the terms and conditions of the pooling arrangement are just and reasonable as between the parties thereto, we submit it must be presumed that such approval is in furtherance of the development and maintenance of an adequate system of National transportation, which, as this court has frequently said, was one of the prime purposes of Transportation Act 1920, and it is immaterial in what way or manner such plan or arrangement may affect any carrier who is not a "carrier involved". It should be presumed that the Commission in reaching its conclusion has weighed all the effects, both favorable and unfavorable, that may result. Therefore, if in its judgment, after hearing, the Plan presented to it for approval meets the statutory requirements and if the benefits to transportation that will accrue from the Plan outweigh any disadvantages that may follow its adoption, it is not for the courts to set aside the judgment of the Commission, if it acted within the scope of its authority.

In *Indian Valley Railroad* v. *United States, et al.*, 52 Fed. (2d) 485 (Aff. mem. op. 292 U. S. 608), the court said, at 486:

> "(3) It is not for the courts in reviewing orders of the Commission to weigh the evidence or inquire into the soundness of the reasoning by which the Commission reached its conclusions, or to question the wisdom of the Commission's action, if within the scope of its authority. *Oregon-Washington R. & Nav. Co. et al.* v. *United States, et al.* (D. C.) 47 F. (2d) 250, 251; *The Assigned Car Cases*, 274 U. S. 564, 580, 47 S. Ct. 727, 71 L. Ed. 1204; *Chicago, R. I. & P. R. Co.* v. *United States, et al.*, 274 U. S. 29, 47 S. Ct. 486, 71 L. Ed. 911; *Virginian R. Co.* v. *United States, et al.*, 272 U. S. 658,

665, 47 S. Ct. 222, 71 L. Ed. 463; *The New England Divisions Case, supra; United States, et al.* v. *Erie R. Co.*, 280 U. S. 98, 50 S. Ct. 51, 74 L. Ed. 187."

We submit the report of the Commission and the findings of the District Court, from which this appeal is taken, correctly interpreted the provisions of Section 5 (1).

Conclusion.

Both the Commission and the specially constituted District Court found that in the past appellant never participated as a carrier in the ore traffic from Menominee Range to the docks at Escanaba; that it does not now participate in this traffic as a carrier; and that its status is that of a lessor of trackage rights to the Milwaukee. These are findings of fact within administrative functions of the Commission. There is no contention that these findings are not supported by substantial evidence.

The specially constituted court in conclusion of Law No. 2 stated:

> "The Commission's order of November 18, 1936, is within its authority under section 5 (1) of the Interstate Commerce Act. Plaintiff is not a carrier involved in the pooling arrangement approved by said order."

It is submitted that the Commission and the specially constituted District Court correctly construed Section 5 (1) of the Act and that appellant's assent to the pooling arrangement approved by the Commission is not required; that the judgment appealed from should be affirmed.

Respectfully submitted,

O. W. Dynes,

C. R. Sutherland,

Attorneys for Intervening Defendants,

Appellees.

Dated at Chicago, Illinois, January 29, 1938.

ESCANABA & L. S. R. CO. v. UNITED STATES et al.

(SCANDRETT et al., Interveners).[1]

No. 831.

District Court, W. D. Michigan, N. D.

March 10, 1937.

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1. COMMERCE—95.

The courts may not consider the weight of evidence supporting order of Interstate Commerce Commission or wisdom of order, provided there is evidence to sustain it.

2. COMMERCE—95.

The courts accord to findings of the Interstate Commerce Commission the strength due judgments of a tribunal appointed by law and informed by experience.

3. COMMERCE—88.

Order of Interstate Commerce Commission permitting intervening railroad operating under trackage rights contract over plaintiff railroad's tracks to enter into pooling agreement with another railroad for pooling of iron ore traffic from certain range, and for pooling of their earnings on class and commodity traffic interchanged between them and plaintiff railroad, did not deprive plaintiff railroad of legal rights, notwithstanding intervening railroad would discontinue operations under trackage rights contract (Interstate Commerce Act § 3(3), 49 U.S.C.A. § 3(3)).

4. COMMERCE—85(3).

The Interstate Commerce Commission's certificate that public convenience and necessity permitted abandonment

1. As reported in 21 F. (Supp.) 151 (Advance Sheets Jan. 8, 1938).

by intervening railroad of operations under trackage rights contract over plaintiff railroad's line was within Commission's authority, where abandonment authorized did not relate to usual and ordinary railroad operation, but related principally to transportation of iron ore (Interstate Commerce Act § 1(18-20), 49 U.S.C.A. § 1(18-20)).

5. Carriers—29.

Where railroad carrying iron ore over plaintiff railroad's line under trackage rights contract, carried ore in its own cars with its own locomotives and with its own train crews under bills of lading issued by it under tariffs and rates established by it, plaintiff was not carrier involved in agreement between railroad operating under trackage rights contract and another railroad for pooling of iron ore traffic and of their earnings on class and commodity traffic interchanged between them and plaintiff, and plaintiff's assent to the pooling agreement was not necessary (Interstate Commerce Act § 5(1), 49 U.S.C.A. § 5(1)).

Suit by the Escanaba & Lake Superior Railroad Company against the United States of America, and another, wherein Henry A. Scandrett and others, trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervened.

Order for defendant.

Findings of Fact.

1. Plaintiff is a railroad company incorporated under the laws of Michigan, and is engaged in the interstate transportation of freight and passengers. It owns and operates a line of railway from Escanaba, Mich., where it connects

with the Chicago & North Western Railway and extends in a northwesterly direction for a distance of approximately 63 miles to Channing, Mich., where it connects with the Chicago, Milwaukee, St. Paul & Pacific Railroad. It is a common carrier, subject to the provisions of the Interstate Commerce Act (49 U.S.C.A. § 1 *et seq.*).

2. The defendants are the United States of America and the Interstate Commerce Commission. The trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company were permitted to intervene as defendants.

3. On March 12, 1935, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Chicago & North Western Railway Company, and a nonoperating subsidiary of the latter known as Escanaba, Iron Mountain & Western Railroad Company, filed application with the Interstate Commerce Commission under which they sought an order under paragraph 1 of Section 5 of the Interstate Commerce Act (49 U.S.C.A. § 5(1)), authorizing applicants to pool ore traffic and divide the earnings therefrom, moving from the Menominee Range in Michigan and Wisconsin to the docks at Escanaba, as provided for in an agreement between the three parties, a copy of which was attached to said application. The agreement also provided for the pooling of certain substantial traffic other than iron ore from the Menominee Range, namely, all class and commodity traffic interchanged by the applicants with the plaintiff, as described; the substance of the agreement being as follows: "52. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is, therefore,

agreed that from the effective date of this contract the revenues of the two companies from all business interchanged with the Escanaba and Lake Superior shall be pooled on the following basis:"

4. Subsequently, by appropriate petitions and orders, the trustees, appointed by the United States Court at Chicago in proceedings under section 77 B of the Bankruptcy Act (11 U.S.C.A. § 207), of both the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company joined in the aforesaid application.

5. The aforesaid application was denied in a report (*Pooling of Ore Traffic in Wisconsin and Michigan*, 210 I.C.C. 599) and an order was entered September 24, 1935, without prejudice to a renewal if and when the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should procure from the Commission a certificate of convenience and necessity under paragraph (18) of section 1 of the act (49 U.S.C.A. § 1(18)) for the abandonment of certain operations, as contemplated by the aforesaid pooling plan.

6. The Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed with the Commission on November 29, 1935, a contingent application under paragraph (18) of section 1 for a certificate of public convenience and necessity, in substance seeking permission for abandonment of operation, under trackage rights, over the line owned by the Escanaba & Lake Superior Railroad Company between Channing and Escanaba, Mich., and for an order authorizing pooled use and operations of certain tracks and facilities in Michigan and Wisconsin, as more fully set forth in its application, which was docketed as Finance Docket No. 11025. The abandonment request was contingent upon favorable action on the pooling proposition. Thereafter, the aforesaid trustees of the property joined in said application.

7. Plaintiff Escanaba & Lake Superior Railroad Company did not assent to the aforesaid pooling arrangements. It intervened in the aforesaid proceedings, and presented evidence in opposition to both applications. The Escanaba Chamber of Commerce and other organizations and representatives of the communities in the territory affected intervened and offered testimony in opposition to both applications.

8. On November 18, 1936, an order was made and entered by the Interstate Commerce Commission approving and authorizing the pooling by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees, and the Chicago & North Western Railway Company, Charles P. Megan, trustee, and the Escanaba, Iron Mountain & Western Railroad Company (a wholly-owned and controlled subsidiary of the Chicago & North Western Railway) of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of certain class and commodity traffic, and for division of earnings thereon, on terms and conditions set forth in the contract referred to in the Commission's report. On the same date, the Commission made and entered a certificate of public convenience and necessity in a proceeding entitled Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees' Abandonment of Operation, certifying that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights, over the plaintiff's line of railroad between Channing and Escanaba, Mich., in Dickinson, Marquette, and Delta counties, Mich.

9. On December 22, 1936, plaintiff brought this suit to set aside the order and certificate of November 18, 1936. Answer was duly filed by the defendants and intervening defendants, and hearing upon said petition was held at Grand Rapids, Mich., January 22, 1937, before this court constituted of three judges; it having been stipulated that said hearing might be held at Grand Rapids, Mich., in the Southern Division, instead of in the Northern Division. At said hearing there was introduced a certified copy of the evidence introduced before the Commission at the hearings held by it in the aforesaid proceedings; also certified copies of certain other portions of the Commission's record in said proceedings.

10. The record before the Commission and before the court shows that the plaintiff company was incorporated February 12, 1900. The first section of its railway, comprising the southern 31 miles from Escanaba as far as Watson, was constructed previous to 1900, primarily as a logging railroad. The western 32 miles from Watson to Channing was constructed in 1900, primarily for the transportation of iron ore and under a contract of the plaintiff with the Chicago, Milwaukee & St. Paul Railroad Company for a term of 20 years, expiring December 31, 1920. Plaintiff's entire line was made of a much heavier type than would have been necessary for logging engines and trains, and with no grades or sharp curves, for the sake of the iron ore traffic. A new contract was executed between the Milwaukee Road and the plaintiff upon expiration of the original contract and will expire January 1, 1951. The agreement of 1900 was made at a time when the Milwaukee Railroad foresaw and was providing for a large increase in the iron ore traffic from the Menominee Range. It had previously handled that traffic by a route southbound over its main line through Channing down to Pembine, Wis.,

thence over the Soo Line to the latter carrier's docks at Gladstone, Mich.

11. Since the year 1900, the Milwaukee Railroad has run its ore trains from Menominee Range via Channing over the line of railway owned and maintained by plaintiff and to docks at Escanaba owned by the Milwaukee Road, for transshipment via lake vessels. The tariffs of freight rates under which this ore has moved are tariffs of the Milwaukee Railroad. The engines and cars are owned and the train crews are employed by the Milwaukee Road. The plaintiff is lessor of the tracks from Channing to Escanaba, it maintains the tracks, under a high standard of maintenance, and it dispatches the movements of the ore trains.

12. The Chicago & North Western Railway also has been a very large carrier of iron ore for many years past from the Menominee Range to Escanaba which moves over its line of railroad to Iron Mountain, Mich., and thence eastward over a line owned by Escanaba, Iron Mountain & Western Railroad, which is a wholly-owned nonoperating subsidiary of the North Western, to ore docks owned and operated by the North Western at Escanaba.

13. The ore docks of the Milwaukee Road at Escanaba became seriously out of repair in 1932, and since that time that road has been making use of the North Western ore docks. Thereupon, the officials of the two roads made a private study, which was completed in 1932, of the feasibility of a plan of pooling the ore traffic. This resulted in the execution of the pooling agreement aforesaid, and the application to the Commission.

14. The plaintiff also interchanges with each of the applicant railroads a large volume of general traffic which moves over through routes and under joint rates of the plaintiff with each such applicant. The agreement between the applicants, as approved by the Commission, provides

for the pooling of all earnings of this joint traffic. There is no pooling of the traffic itself or of the facilities used in moving the traffic. There is nothing in this portion of the pooling plan which interferes with the interchange, routing, or division of earnings allocated to plaintiff, or with the rates on the traffic so interchanged. By the application to the respective roads of 30 per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with plaintiff, and competition between the Milwaukee Railroad and the North Western Railway on traffic originating and terminating on the line of plaintiff is thereby preserved.

Conclusions of Law.

1. The Commission's findings and conclusions, as set forth in in its reports of September 24, 1935, and November 18, 1936, are supported by substantial evidence.

2. The Commission's order of November 18, 1936, is within its authority, under section 5(1) of the Interstate Commerce Act (49 U.S.C.A. § 5(1)). Plaintiff is not a carrier involved in the pooling arrangement approved by said order. The carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement. None of plaintiff's traffic and none of its earnings are to be pooled, and it is not a party to the pooling agreement. Therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under section 5(1) of the act.

3. There is nothing before the court to indicate that the pooling of earnings as between the Milwaukee and the North Western on class and commodity traffic will result in violations of section 3(3) of the Interstate Commerce Act (49

U.S.C.A. § 3(3)) to the injury of plaintiff. Nor is there anything before the court to indicate that complaint of such alleged violations has been submitted to or passed upon by the Commission either in the aforesaid proceedings or otherwise.

4. The Commission's certificate that public convenience and necessity permit the abandonment by the Milwaukee of operation under trackage rights over plaintiff's line between Channing and Escanaba is within its authority under section 1 (18), (19), and (20), of the Interstate Commerce Act (49 U.S.C.A. § 1 (18-20)).

5. Said certificate and said order approving the pooling arrangement were made after full hearing, and are fully supported by the evidence. In making them, the Commission committed no error of law, and both are valid.

6. An order will be entered denying the prayer of the petition filed herein.

* 2 * * * * *

Before SIMONS, *Circuit Judge*, and MOINET and RAYMOND, *District Judges*.

RAYMOND, *District Judge*. Plaintiff seeks, under the authority of 28 U.S.C.A. §§ 41 (28), 45 46 and 47 (28 U.S.C.A. §§ 41 (28), 45, 46, 47), to enjoin an order and certificate of the Interstate Commerce Commission entered November 18, 1936. The Commission's report issued therewith is found in *Pooling of Ore Traffic in Wisconsin and Michigan*, 219 I.C.C. 285. That report and the findings of fact accompanying this opinion sufficiently state the relationship of the parties and the course of the litigation. Upon oral argument, counsel agreed that the issues here for consideration are greatly restricted by the provisions of the Transportation Act of

2. Appearances omitted.

1920 (41 Stat. 456), which introduced into federal legislation a new railroad policy and vested the Commission with extensive powers and discretion beyond the scope of review by the courts. See *New England Divisions Case,* 261 U.S. 184, 189, 43 S.Ct. 270, 273, 67 L.Ed. 605; *Texas & Pacific Railway Co.* v. *Gulf, etc., Railway Co.,* 270 U.S. 266, 277, 46 S.Ct. 263, 266, 70 L.Ed. 578; and *Colorado* v. *United States,* 271 U.S. 153, 162, 163, 46 S.Ct. 452, 453, 454, 70 L.Ed. 878.

In general, the order and certificate complained of authorize the pooling of iron ore traffic from the Menominee Range to the docks at Escanaba, Mich., the pooling of the revenues therefrom, the expenses thereof, and of the tracks, equipment, facilities, and employees engaged in that traffic between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago & North Western Railway Company; the pooling by these two railroads of their earnings on class and commodity traffic interchanged between them and the plaintiff at Channing and Escanaba; and the abandonment by the Milwaukee Road of its operations under trackage rights for transportation of iron ore over the line of plaintiff's railway from Channing, Mich., to Escanaba.

Plaintiff urges that the record contains no substantial testimony tending to prove that competition will not be unduly restrained by the pooling of traffic in iron ore; that there is no evidence to support findings sustaining the pooling of class or commodity traffic; that there is no substantial evidence warranting the Commission's finding that public convenience and necessity permit abandonment of the operation by the Milwaukee Road of plaintiff's railway line from Channing to Escanaba under the agreement for trackage rights and argues that the overwhelming preponderance of the evidence is that the direct probable results of

such abandonment will be serious injury and detriment to the public. Plaintiff also insists that the Commission's jurisdiction to authorize the pooling of freight by railroad is expressly limited by the requirement of paragraph 1 of section 5 of the act (49 U.S.C.A. § 5(1)), that division of traffic or earnings shall be assented to by all the carriers involved; that it is a carrier involved; and that its assent has not been given.

[1, 2] The binding effect of fact findings by the Commission and the limitations upon the power of the courts to disturb them have been so frequently noted that restatement is not required. See *Pittsburgh & W. V. Railway Co.* v. *United States* (D.C.) 41 F. (2d) 806, 808. It is clear that courts may not consider the weight of the evidence or the wisdom of the order made, provided there is evidence to sustain it. The courts accord to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." See *Illinois Central Railroad Co. et al.* v. *Interstate Commerce Commission,* 206 U.S. 441, 27 S.Ct. 700, 704, 51 L.Ed. 1128. In the instant case, the Commission found that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the pooling agreement; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable. Examination of the record is convincing that there is substantial evidence to support these findings. It is true that the applicants did not upon some issues produce all of the available evidence; that some of the evidence was of the kind commonly designated as opinion or expert evidence, given by employees of some of the

interested parties; and that other evidence was indirect or circumstantial. But these considerations do not warrant its rejection in determining whether or not there was more than a mere scintilla of evidence before the Commission. Such evidence is commonly accepted as convincing, even in criminal trials. Against the admitted loss and inconvenience to the communities along the line of plaintiff's railroad, the Commission was charged with the responsibility of weighing the loss and inconvenience to the larger general public; national in scope. Under repeated decisions, we have no right to weigh this evidence to determine whether our conclusions thereon would differ from those of the Commission.

[3, 4] It it important to observe that the abandonment authorized by the Commission does not relate to usual and ordinary railroad operations. It is limited to the discontinuance of operations by the Milwaukee Railroad under a contract for trackage rights relating principally to the transportation of iron ore. Continuance by plaintiff of operation by the railroad is in no way limited. The trackage contract confers only a privilege. It does not obligate the Milwaukee to make any use of plaintiff's track. The pooling arrangement approved by the Commission enables the Milwaukee to effect substantial economies which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually. Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right.

[5] Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the interchange of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract the Milwaukee, as lessee of trackage rights, is the sole carrier of this traffic. Other traffic interchanged at Channing with the Milwaukee is not disturbed by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the conseqnences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway.

The conclusion of the court is that the certificate and order complained of find adequate support in the record, and that the prayer of the petition filed herein should be denied. An order will be entered accordingly.

No. 26903[1]

Pooling of Ore Traffic in Wisconsin and Michigan

In the Matter of Application of Chicago & North Western Railway Company, Escanaba, Iron Mountain & Western Railroad Company, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company for Authority to Pool Ore Traffic from Menominee Range to Docks at Escanaba, Mich., and to Divide Earnings Therefrom

Submitted September 26, 1936. Decided November 18, 1936

1. Proposed contract between the Chicago & North Western Railway Company, the Escanaba, Iron Mountain & Western Railroad Company, and the trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, providing for the pooling of interstate ore traffic from the Menominee Range in Michigan and Wisconsin to Escanaba, Mich., and of class and commodity traffic to and from points on the line of the Escanaba & Lake Superior Railroad Company, and the division of earnings therefrom, approved. Prior report, 210 I. C. C. 599.

2. Certificate issued permitting abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights over the Escanaba & Lake Superior Railroad Company's line of railroad in Dickinson, Marquette, and Delta Counties, Mich.

Appearances as in 210 I. C. C. 599; also *Arthur J. Lovell*, for interveners.

[1] This report also embraces Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment of Operation.

REPORT OF THE COMMISSION ON FURTHER HEARING

DIVISION 4, COMMISSIONERS MEYER, PORTER, AND MAHAFFIE

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by the Escanaba and Lake Superior Railroad Company and the issues were orally argued.

In the original report in no. 26903, 210 I. C. C. 599, division 6 considered an application for approval of a contract between the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter termed the North Western and the Milwaukee respectively, providing for the pooling of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, hereinafter termed the Escanaba Company, and for the division of earnings therefrom. The application was denied without prejudice to the filing of another application under section 5 (1) of the Interstate Commerce Act after a certificate of convenience and necessity had been obtained permitting the abandonment of operation involved or the filing of an application under section 5 (1) at the time of filing the application for such a certificate. The Milwaukee transports the ore traffic over the line of the Escanaba Company between Channing, Mich., and Escanaba, under a trackage-right contract which does not expire until January 1, 1951. The abandonment by the Milwaukee of the use of the Escanaba Company's tracks is incidental to the operation of the pooling plan.

Accordingly, application was filed on November 29, 1935, for a certificate of public convenience and necessity permitting the abandonment by the Milwaukee of this operation

between Channing and Escanaba, 63.5 miles, and for an order authorizing a pooled use and operation of certain tracks and facilities in Iron, Dickinson, Menominee, and Delta Counties, Mich., and Florence County, Wis. This application is recorded in Finance Docket No. 11025 and was heard with the application in no. 26903, which was reopened for further hearing.

Since January 1, 1936, the Milwaukee has been in the custody of trustees appointed in reorganization proceedings under section 77 of the Bankruptcy Act, as amended. Subsequent to the filing of the application in Finance Docket No. 11025, a supplemental application was filed reciting appointment of Henry A. Scandrett, Walter J. Cummings, and George I. Haight, as trustees of the Milwaukee, and requesting that they be made parties applicant in the proceeding. Also the trustees of the Milwaukee filed a motion immediately preceding the further hearing in no. 26903 requesting that they be joined as parties applicant in that proceeding. The North Western was not represented at the further hearing, which related principally to the abandonment under consideration. Later, Charles P. Megan, trustee for the North Western also filed a motion requesting substitution as a party applicant. The North Western has been in trusteeship since June 28, 1935. No objection was made to these motions. These trustees have been made parties to these proceedings.

The Escanaba Company intervened in opposition to the proposed abandonment of operation, and the proposal is opposed also by the cities of Escanaba and Iron Mountain, Mich., the chambers of commerce of those communities, the village of Channing, the supervisors of Delta County, representatives of the carriers' employees, and residents of the territory tributary to the line of Escanaba Company.

The first contract granting the Milwaukee trackage rights

over the rails of the Escanaba Company for 20 years was made in 1900. At that time the line was a logging road extending about 31 miles from Escanaba to Watson, Mich. A condition contained in that contract required the extension of the Escanaba's rails from Watson to Channing. This condition, which was later fulfilled, consummated the contract. Before the expiration of the first contract the present one was executed covering the period from January 1, 1921, to January 1, 1951.

It appears desirable that certain of the basic facts recited in the original report be repeated. The Milwaukee has a line running north from Iron Mountain to Channing, 24.1 miles, thence West to Kelso Junction, Mich., 7.8 miles, thence northwest to Amasa, Mich., 12.4 miles, and beyond to Ontonagon, Mich. Regular freight and passenger service to and from Channing is maintained over those lines. It also has a line running northeast from Iron River, Mich., to Channing. All ore now handled by it from the Menominee Range is concentrated in its own yards at Channing, whence it is moved by its own power and crews, under trackage right over the rails of the Escanaba Company to Escanaba where it is delivered to the docks, which will presently be described. The Milwaukee also has the right under the contract to use the line of the Escanaba Company running southeasterly from Wells Junction through Wells in the immediate vicinity of Escanaba. Ore trains of the Milwaukee move to a point just south of Wells Junction where they enter the yard of the Milwaukee. The Milwaukee is also privileged under the contract to handle certain coal outbound from its docks located immediately north of its ore docks; and also it may handle company construction material between Channing and its docks at Escanaba. It does not operate any scheduled service and has no station at any point on the line of the Escanaba Company.

The Milwaukee owns two ore docks at Escanaba, known

as docks 1 and 2, which were built in 1901 and 1902 respectively, and which have not been reconstructed. In 1934 it used its dock 2. This it was able to do by making temporary repairs costing approximately $30,000 and because the traffic that year was very light. But the Milwaukee's docks since that time have deteriorated to such an extent that they have not been usable. In the last year it has been using the North Western's docks on the same terms agreed to in the proposed pooling contract. At the time of the further hearing the ore season had not opened for the year 1936. Under the proposed plan the Milwaukee would be accorded the use of the North Western's dock at Escanaba for the handling of ore from the Menominee Range.

The proposed contract provides that the Milwaukee shall handle, with its road trains and crews, ore from the mines in the vicinity of Amasa, in the Menominee Range, over its own line to Iron Mountain, where the ore would be delivered to the North Western. All other ore from the Menominee Range would be handled by the road trains and crews of the North Western from production points to Escanaba over its own rails. From Iron Mountain to Escanaba the loaded ore cars would move over the line of the Escanaba, Iron Mountain and Western Railroad Company, a subsidiary of the North Western, and the empty cars would move back from Escanaba to Iron Mountain over the line of the North Western. This arrangement would virtually furnish a double-track movement, although slightly longer than the present route, as these lines nearly parallel each other between the points indicated. The details of this proposed operation are contained in the contract.

Most of the mines in the Crystal Falls and Iron River districts, within the Menominee Range, are served by both the Milwaukee and North Western over jointly owned mine tracks. A few of the mines are served by tracks owned by

either one or the other of those companies. At some mines the Milwaukee performs all the switching for both roads, and at others the North Western performs all of the switching. Under the present arrangement it is the practice of the ore shippers in this producing area to divide their tonnage between the two lines. When shipment over one line is temporarily discontinued and begun over the other line the carrier that has been hauling the ore moves its switch engines and equipment, making way for the operations of the other carrier. Under the proposed plan the shifting of switch engines and equipment by the respective carriers as described would be discontinued.

The ore is of varying grades and the prevailing practice is to mix ore at the docks in order to obtain a definite chemical combination or grade for each cargo. Each car of ore is sampled at the mine as it is loaded, and the disposition of it thereafter is controlled by the results of the sample and the use that can be made of it in building up the definite cargo content desired. When the Milwaukee used its own docks, it maintained a switch engine at its yards for breaking up ore trains, placing loads on the dock for unloading, and removing and assembling the empties for trains returning to Channing. In 1932, 1933, and 1935, when the Milwaukee used the North Western's dock, the latter performed the switching at the dock and its engines went into the Milwaukee's yards, classified the ore, and moved it to the North Western's dock after the cars were ordered by the dock agent. It is more economical to switch ore from the North Western's yards than from the Milwaukee's yards to the dock of the North Western.

All revenues from ore traffic from the Menominee Range transshipped through the dock of the North Western at Escanaba would be apportioned upon the division of the business obtaining during the 10-year period 1923 to 1932 which was 34 percent to the Milwaukee and 66 percent to

the North Western. The expenses directly connected with the movement of the ore would be divided upon the same percentages as the revenues. Locomotives and cars for the movement would likewise be furnished upon the same percentages. Savings as determinable in advance of pooling, and mainly as derived from discontinuance of the use of the facilities of one of the carriers would be divided approximately equally between the two parties. Other savings resulting from consolidation of operations over a single line, and through one set of facilities, would be divided between the two parties approximately upon the division of revenues and the direct operating expenses. It appears that some of the savings could be calculated definitely, while others could only be approximated.

In 1935 the first ore was handled on April 23 and the last on November 18. Between the dates indicated, 210 days, the Milwaukee handled 79 trains over the line of the Escanaba Company. The average tonnage for the 79 trains was 8,872 tons, including also the weight of the equipment. The average annual shipments of ore from the Menominee Range during the 10-year period 1923 to 1932 were 4,074,869 tons, of which 1,391,443 tons, or 34 percent, moved by the Milwaukee and the remainder, 2,683,426 tons, by the North Western. During the same period all of the ore over the Milwaukee was handled through the docks at Escanaba and 3,191,934 tons, part of which came from the Marquette Range, moved by the North Western to Escanaba and was handled through the docks at that point. In 1935, 1,633,879 tons of ore moved from the Menominee Range, of which 28.5 percent or 465,602 tons moved by the Milwaukee and 1,168,277 tons moved by the North Western. In that year a total of 1,823,655 tons of iron ore moved to the docks at Escanaba. The movement in 1935 from the Menominee Range over the Milwaukee was about 165,000 tons less than in 1934 and about 38,000 less than in 1933.

Under the present contract the Milwaukee is obliged to pay to the Escanaba Company $27,000 per annum as a fixed minimum rental until January 1, 1951, and in addition thereto amounts on a tonnage, or so-called wheelage basis, including a *pro rata* share of the operation expenses, taxes, and additions and betterments. The average annual payment of the Milwaukee to the Escanaba Company on account of the trackage rights on the ore traffic during the 10-year period from 1923 to 1932 was $181,226, and for the 5-year period from 1931 to 1935, $79,555. The detailed items included in these payments are maintenance of way and structures, transportation other than train, taxes, amortization and interest on additions, current betterments, and such amounts of rental as the *pro rata* proportion of the use of the line of the Escanaba Company bore to the number of miles run by the cars and engines of both companies operating over the tracks of the Escanaba Company, during each year, subject to a minimum rental of $27,000.

If the Milwaukee were to continue handling ore to docks, it would be necessary to rebuild its no. 1 dock at an estimated cost of $1,000,000. Under present financial conditions, the Milwaukee would have difficulty in obtaining the funds for that purpose, and were it possible so to do, the wisdom of such an investment might be questionable in view of the prospective ore tonnage. The new dock would cost the Milwaukee annually about $110,000 for interest, depreciation, maintenance, taxes, and fire insurance and protection. The average annual cost to the Milwaukee in similar items for use of the North Western's dock under the terms of the contract is estimated at approximately $46,000. One of the North Western's docks has an estimated remaining life of 15 years.

Approval of the proposed plan would allow the Milwaukee to salvage its ore yards and its tracks to the docks at Escanaba, which would result in a saving of $4,225 per

year, and under the terms of the pooling contract it is estimated that one-half or $2,112 would represent the amount saved by the Milwaukee. Based upon the 10-year period prior to 1932, the Milwaukee would save in maintenance of way and structures not due to use, approximately $41,950 in connection with the line-haul service from the range to the dock. To these figures, when adding the amount of rental over the minimum until 1951, taxes and general expenses, estimated savings annually of $76,845, of which 50 percent, or $38,423, could be assigned to the savings to the Milwaukee under the terms of the proposed pooling contract. Under that contract there would also be eliminated maintenance not due to use in connection with the tracks and yards on the range, $5,000; interest on so-called salvage, $800; and taxes of $200; or a total saving of $6,000, of which 50 percent, or $3,000, would accrue to the Milwaukee. These savings to the Milwaukee, so long as the present North Western dock is in use, would total $109,675 per annum. Other savings under the proposed plan can not be reduced to figures but would be accomplished by joint handling of the ore tonnage through the docks, from joint or consolidated switching on the range or at intermediate points, and of train service between the range and the docks. There would also be substantial savings to the Milwaukee in the reduction in the number of ore cars required.

The Milwaukee's operating revenues declined from $142,569,632 in 1930 to $84,900,833 in 1932, but since that year have risen to $87,859,792 in 1934 and $92,473,793 in 1935. In this period the system sustained net losses aggregating almost $90,000,000.

One provision of the contract as to pooling of traffic provides that the revenues of the Milwaukee and the North Western on traffic interchanged with the Escanaba Company shall be pooled. Under this proposed arrangement a study of the 6-year period 1927 to 1932 is to be made, and

the total revenue accruing to each company on business interchanged by the Milwaukee and the North Western with the Escanaba Company is to be determined. From the total business amount interchanged by the Milwaukee with the Escanaba Company an amount equal to 10 percent is to be deducted. The relation between the remainder and the total of such remainder, plus the revenue of the North Western, is then to be determined. Thereafter, the total revenues derived by each company from traffic interchanged with the Escanaba Company, less an amount of 30 percent of such gross revenues to cover cost of handling by either company, is to be put into a pool and divided on the basis of the percentages established for the 6-year period. For the 6-year period 1927 to 1932, the total net revenue on traffic to and from points on the line of the Escanaba Company accruing to the Milwaukee was $766,645 and to the North Western $992,290.

Under another provision of the contract the North Western agrees to join with the Milwaukee in establishing appropriate joint rates and divisions for handling interline traffic via Iron Mountain, so as to permit the Milwaukee to continue handling traffic to and from industries served by the Escanaba Company, either direct or through reciprocal switching arrangements with the North Western. All such traffic interchanged at Iron Mountain would be included in the foregoing pool the same as traffic interchanged at Channing. The provision in the contract regarding the establishment of joint rates between the Milwaukee and the North Western on traffic interchanged with the Escanaba Company would seem to contemplate that at some later time the Escanaba Company might be abandoned west of Groos or west of Northland, thus discontinuing the only connection, at Channing, with the Milwaukee. This subject will be discussed in connection with the opposition presented by the Escanaba Company.

The line of the Escanaba Company connects with the line of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company at North Escanaba but the latter line is principally an east-and-west railroad and any route by that line to Chicago, Ill., or lower Wisconsin destinations would be circuitous and not ordinarily used. Discontinuance of service by the Escanaba Company on the part of its line into Channing would necessarily destroy the competitive nature of this class and commodity traffic interchanged with the Escanaba Company. Under the proposed contract this traffic may be hauled by either the Milwaukee or the North Western and it is provided that joint rates will be established between these two lines through Iron Mountain. Only the revenue is to be pooled. In 1935 the revenue on interline traffic interchanged with the Milwaukee at Channing was $69,884 and that interchanged with the North Western at Escanaba was $68,706. Such revenues would not be affected, so long as the Escanaba Company continues its present plan of operation.

The Escanaba Company contends also that the Milwaukee's application for permission to abandon operation is conditional, and that the North Western has not complied with the provisions of section 1 (18) by seeking permission to abandon its Amasa branch, which would be necessary to make effective the proposed plan. The Milwaukee's application is definite and certain. It seeks the abandonment under consideration only if the pooling arrangement be approved. The North Western has not tested the merits under section 1 (18) of abandoning its Amasa branch, but intends to file an application at the appropriate time for permission to abandon that branch.

The Escanaba Company fears that the abandonment of the use of its line for ore trains would jeopardize its revenues to such an extent as to lead to the abandonment of its line except possibly a small section thereof east of Groos.

It has 18 stations which are the following distances in miles from Wells: Escanaba 4, Groos 2, Lamber 5.5, Chandler 9.5, Salva 12, Cornell 13.5, Woodlawn 18, Hendricks Tank 21, Hendricks 22, Mashek 29.5, Reade 33.5, Northland 36, Alfred 38.5, Savards 41.5, Ralph 46.5, Turner 52.5, Golden 59, and Channing 63.5. The territory adjoining the tracks of the Escanaba Company was once heavily timbered. Most of the heavy timber has been cut out, the territory has been settled by farmers to some extent, and small communities have sprung up near some of the stations. Ralph, Northland, and Watson each have about 75 to 80 people. The farmers supplement their earnings by cutting small timber. The territory adjoining the tracks of the Escanaba Company is sparsely settled and the growth of agriculture has been slow. In 1935 the 18 intermediate stations on that line originated 46 carloads of potatoes, 5 carloads of sugar beets, 1 carload of hay and grain, and 1 carload of machinery, or a total of 53 carloads, or 974 tons. The forest products that year amounted to 544 carloads. From 1931 to 1935 the Escanaba Company hauled 2,112,580 tons (62,229 carloads) of carload freight, and 13,914 tons of less-than-carload freight, or a total of 2,126,494 tons. By years, in order, the total freight hauled amounted to 463,664, 325,265, 339,997, 473,706, and 523,862 tons, and 13,383, 9,584, 11,333, 13,383, and 14,758 carloads. According to commodities the carloads were divided as follows: Forest products 32,042, manufactures and miscellaneous 16,634, coal 9,213, ore 1,350, other products of mines 1,465, products of agriculture 981, and animals and animal products 544. Forest products comprised 51 percent of the total. This movement by years, in order, was 7,590, 3,964, 5,502, 7,249, and 7,737 carloads. Freight originating at stations between Groos and Channing amounted to 1,424 cars in 1934 and 1,696 cars in 1935, or a total of 3,120, of

which 2,133 moved to local points and 987 to off-line destinations. All but 102 carloads were forest products.

The Escanaba Company fears that as the timber tributary to its line becomes exhausted, the remaining traffic available will be insufficient to yield revenues to support the cost of operation. Practically all the virgin timber has been cut, and while one large company has approximately 6,000,000 feet available for shipment, half of this is to be cut by settlers instead of by the owner.

In 1923 this carrier sustained a net loss of $25,048, but earned net income in each of the succeeding 12 years 1924-35. These net earnings ranged from $14,180 to $138,447 and aggregated $965,739, or over $80,000 per year. In each of the years 1933-35, in order, its net income amounted to $69,703, $72,866, and $69,218. During the years 1923-33 the intervener paid dividends aggregating 115 percent and paid off all its funded debt. Dividends of 10 percent were paid in 1934 and 1935.

The Escanaba Company has undertaken by exhibits to adjust its income statements for 1934 and 1935 to indicate the effect of abandonment of operation by the Milwaukee over its line. These adjustments include in operating expenses proportions paid by the Milwaukee, and exclude from nonoperating income all sums received from the Milwaukee as joint-facility rents. On this basis it is calculated that, without the support received from the Milwaukee for use of its line under the trackage agreement in the years 1931-35, the Escanaba Company would have sustained losses amounting to $61,893, $36,220, $5,548, $9,448, and $5,653, respectively. These calculations do not take into consideration the payments which the Milwaukee would have continued to make under the agreement had the proposed abandonment of operation occurred at the end of 1930, or the possible savings in the expense of maintenance

had the Milwaukee's ore trains ceased to operate over the line subsequent to that year.

A witness for the Milwaukee experienced in the study of the earning capacity of system branch lines expressed the opinion that the Escanaba Company can continue operation for years by virtue of economies in maintenance expenditures and reduced train service, and that, if and when further relief were needed, the portion of its line from Channing to Northland, 27.5 miles, might first be abandoned and the remainder operated, on a self-sustaining basis, as a branch from Northland to Escanaba and Wells.

On behalf of employees of the Milwaukee and the Escanaba Company it is argued that to approve the proposed plan would result in loss of employment and loss of investment in homes, and that before the plan is approved the Milwaukee should agree to indemnify employees against such losses. We have heretofore said that in abandonment proceedings under section 1 (18) we are without power to attach any conditions except as required by public convenience and necessity. *Chicago G. W. R. Co. Trackage,* 207 I. C. C. 315.

Protests of individuals, communities, and commercial organizations are founded on the assumption that service by the Escanaba Company will terminate eventually, if not in the near future, under the proposal of the Milwaukee. Testimony adduced on their behalf is directed to the need for such service and the injury such an abandonment would impose upon the public contrasted with the benefits which would flow to the Milwaukee. Many witnesses residing in villages or communities along the line of the Escanaba Company testified that abandonment of their only railroad service would impair their life's savings invested in homes, deprive them of a means of marketing their crops, and possibly compel them to move and start over again. Escanaba

has a population of 14,524 persons and the population along the line of the Escanaba Company is 6,303. Persons along the eastern 40 miles of the Escanaba Company trade at Escanaba. In 1930, $8,665,000 worth of retail business was transacted by Escanaba merchants. Traffic moving to and from Escanaba, Wells, and Groos is competitive. The service between Escanaba and Chicago via Channing has been placed upon a basis competitive with that of the North Western.

The pooling plan as to traffic other than the ore traffic is intended as an insurance to the Milwaukee of revenue which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of the line of the Escanaba Company, and is merely incidental to the pooling of the ore traffic. There is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the public, that costs of operation will be reduced, or that competition will be unduly restrained. However, according to the record, the earnings of the Escanaba Company on this traffic and services to the public would in no way be affected by the proposed division of earnings by applicants so long as traffic originating at, or destined to, points on the Escanaba is handled as at present.

In the operation of ore trains via Channing, the line of the Escanaba Company is now only an intermediate link between the Milwaukee and the North Western, and the latter carrier operates only as a switching line. The original use of the line of the Escanaba Company for the transportation of ore traffic contemplated the use of the Milwaukee docks. Abandonment of the Milwaukee docks and some restraint of competition as a consequence, is already a reality and it appears that the amount of ore traffic that is likely to move does not warrant the maintenance of ore docks by both the North Western and the Milwaukee. The

Milwaukee and the North Western cannot be required to continue the service embracing the line of the Escanaba Company merely because of the undesirable effect of the discontinuance thereof upon the revenue of that company.

Section 5 (1) is specific in setting out jurisdictional findings of fact which are prerequisite to our approval of a pooling agreement. One of these is that the agreement must be "assented to by all the carriers involved." The Escanaba Company contends that it is a carrier involved within the meaning of the act, and since it has not assented to the pooling agreement, we do not have jurisdiction to approve and authorize the agreement. It is therefore necessary to determine whether the Escanaba Company is a carrier involved within the meaning of the act. As pointed out in the original report, the Escanaba Company never participated as a carrier in the ore traffic in the past. Its status was that of a lessor of trackage rights to the Milwaukee. It does not now participate in this traffic as a carrier. Under these circumstances, it cannot be considered a carrier involved in the pooling agreements now before us. It necessarily follows here that the carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanada Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard.

We find that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the contract; and that the terms and conditions under which such divi-

sion of traffic and earnings is proposed to be effected are just and reasonable.

We further find that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation under trackage rights over the line of the Escanaba and Lake Superior Railroad Company in Dickinson, Marquette, and Delta Counties, Mich., described in the application recorded in Finance Docket No. 11025.

An appropriate order and certificate will be issued effective as to the abandonment of operation from and after 30 days from the date thereof. Suitable provision will be made therein for the cancellation of tariffs.

ORDER.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of November, A. D. 1936.

No. 26903

In the matter of the application of Chicago and North Western Railway Company; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for authority to pool ore traffic from the Menominee Range to docks at Escanaba, Mich., and to divide the earnings therefrom

It appearing, That the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees, filed a joint application under Section 5 (1) of the

Interstate Commerce Act for approval of a contract providing for the pooling of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract;

IT FURTHER APPEARING, That on September 24, 1935, division 6 upon full investigation of the matters and things involved made and filed its report and order in the above-entitled proceeding and subsequently upon appropriate petition reopened the said proceeding for further hearing in connection with Finance Docket No. 11025, Chicago, Milwaukee, St. Paul and Pacific Railroad Company Trustees Abandonment of Operation;

AND IT FURTHER APPEARING, That there has been a full hearing of the matters and things involved in the said proceeding and that the division, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon, which said report and report on further hearing are hereby referred to and made a part hereof:

IT IS ORDERED, That the pooling by the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees, of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract referred to in the report, be, and it is hereby, approved and authorized.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Finance Docket No. 11025

Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Trustees Abandonment of Operation

Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

IT IS HEREBY CERTIFIED, That the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation, under trackage rights, over the Escanaba and Lake Superior Railroad Company's line of railroad in Dickinson, Marquette, and Delta Counties, Michigan, as described in the application and said report.

IT IS ORDERED, That this certificate and order shall take effect and be in force, as to the abandonment of operation herein authorized, from and after 30 days from its date. Affected tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

AND IT IS FURTHER ORDERED, That said trustees, when filing schedules canceling the tariffs shall in such schedules refer to this certificate by title, date and docket number.

By the Commission, division 4.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

SUPREME COURT OF THE UNITED STATES.

No. 415.—October Term, 1937.

Escanaba and Lake Superior Railroad Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, et al.	Appeal from the District Court of the United States for the Western District of Michigan.

[February 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the judgment of a specially constituted District Court[1] dismissing the appellant's bill which prayed relief against an order of the Interstate Commerce Commission approving and authorizing a proposed pooling agreement between two other railroads.[2] The single question presented is whether the appellant is a "carrier involved" within the meaning of Sec. 5 (1) of the Interstate Commerce Act.[3]

The appellant, hereinafter sometimes called "Escanaba", is a Michigan corporation operating a railroad which does business in intrastate and interstate commerce. Its line extends from Escanaba, Michigan, a port on Lake Michigan, northwesterly some sixty-three miles to Channing, which is on the northern border of the Menominee ore district. This district was reached in 1900, and still is served, by the lines of the Chicago and Northwestern Railroad Company (herein denominated "Northwestern") extending from the mines in a general southwesterly direction to the Northwestern's ore docks at Escanaba. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein called "Milwaukee") had in and prior to 1900 a line reaching the Menominee district but the ore shipped over this line went south to a connection with the Soo Line and thence eastward to a destina-

[1] 21 F. Supp. 151.

[2] 210 I. C. C. 599; 219 I. C. C. 285.

[3] Act of Feb. 4, 1887, c. 104, 24 Stat. 380, as amended by Transportation Act of Feb. 28, 1920, c. 91, Sec. 407, 41 Stat. 480, U. S. C. Tit. 49, § 5 (1).

tion other than Escanaba. Milwaukee and Escanaba entered into an agreement in 1900 whereby the former was to have trackage rights for its trains of iron ore from Channing to Escanaba, where the Milwaukee constructed its own ore docks for the lading of ore into lake steamers, and trackage rights for the return of its empty cars from Escanaba to Channing. On the footing of this contract Escanaba made a large investment in roadway suitable for the accommodation of Milwaukee's trains.

The details of the agreement are unimportant. It will suffice to say that Milwaukee had no right to carry passengers or freight, including ore, to intermediate points on the line of Escanaba; had no schedules for its ore trains; operated them by its own personnel and power, subject, however, to the control of the line by Escanaba's dispatchers and signal men. Milwaukee was to pay for the privilege a certain wheelage charge which, in no event, was to be less than $27,000 a year whether the total wheelage amounted to that sum or not; and was to pay certain other amounts towards the maintenance of Escanaba's line. A renewal of this agreement is now in force and will so remain until January 1, 1951.

Milwaukee's docks at Escanaba have fallen into disrepair. To avoid the large expenditure required to restore them, and to retain a share of the ore transportation, Milwaukee negotiated a pooling agreement with Northwestern under the terms of which ore consigned over either line from the mines to Escanaba will be routed over Northwestern's line and use Northwestern's docks at Escanaba and the ore business of both lines will be pooled on an agreed basis. Inasmuch as certain freight other than iron ore has been interchanged by Milwaukee with Escanaba at Channing and by Northwestern with Escanaba at Escanaba, and, as it is believed the ore pooling arrangement and discontinuance of Milwaukee's ore haulage over Escanaba's tracks may cause Escanaba to abandon the western end of its line, thus preventing the interchange of Milwaukee and Escanaba at Channing, it is further agreed that Milwaukee and Northwestern shall pool the receipts from interchange traffic exchanged by either of them with Escanaba, to recompense Milwaukee for possible loss of business resulting from the ore traffic pool. The two railroads, parties to the pooling agreement, submitted it to the Interstate Commerce

Commission for approval.[4] That body held that the proposed discontinuance of operation by Milwaukee over Escanaba's line under the trackage agreement amounted to an abandonment as defined by Sec. 1 (18) of the Interstate Commerce Act[5] and, without the Commission's approval of the abandonment, the pooling agreement could not become effective. The Commission, therefore, refused to pass upon it. Thereupon the parties resubmitted the pooling agreement together with a conditional application by Milwaukee for abandonment of its ore haulage over Escanaba. Escanaba intervened in the proceeding, and resisted the issue of an order of approval. A hearing was had at which not only Escanaba but many shippers and communities on its line presented evidence. The Commission made the findings required by Sections 1 (18) and 5 (1) of the Act, particularly that the proposed pooling arrangement and abandonment of the line by Milwaukee would promote the public interest and convenience and issued orders authorizing the proposed arrangement. Escanaba has abandoned the contention made in the District Court, and there overruled, that the Commission's findings are not supported by any evidence, and here attacks only the alleged error of law of the Commission and the court below in holding that it is not a "party involved" in the pooling agreement within the meaning of Section 5 (1), whose assent is necessary to the approval of the Commission.

Section 5 (1) of the original Interstate Commerce Act in sweeping terms forbade all pooling of freights of different and competing railroads and all agreements for division of aggregate or net proceeds of their earnings or any portion thereof. The Transportation Act, 1920, qualified this prohibition by excepting such arrangements as should have the specific approval of the Commission, and that approval was thus conditioned:

"That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, *if assented to by all the carriers involved,*

[4] They were represented before the Commission by their respective trustees appointed under Section 77 of the Bankruptcy Act.

[5] U. S. C. Tit. 49, § 1 (18).

such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises." (Italics supplied.)

The controversy revolves around the meaning of the phrase "if assented to by all the carriers involved." Escanaba insists that it is a carrier involved in the proposed agreement, and its assent is necessary to an affirmative order of the Commission. The appellees deny that it is such and the Commission and the District Court have held with them. We are of opinion that the decree of the District Court was right and must be affirmed.

First. The amendment of Section 5 (1) of the original statute by the Transportation Act, 1920, was one of the alterations made in the Act as a result of experience gained from unified operation of the railroads under federal control. The strict sanctions of the original Act, intended to preserve competition between carriers, were, in a number of instances, relaxed. Mergers and consolidations were authorized, pooling arrangements were to be permitted, extensions and abandonments were made lawful and divisions of joint through rates might be adjusted, all for the sake of economy and efficiency and the prevention of destructive competitive practices, and all subject to the supervision and control of the Interstate Commerce Commission, and its finding that the action proposed or ordered would be in the public interest. These amendments are to be given liberal construction in aid of the purposes Congress had in mind. Under the new provisions, Milwaukee and Northwestern might have merged or consolidated if the Commission found such a procedure would be in the public interest. Similar considerations would justify their proposed pooling of freight transportation. Shippers over Escanaba's lines, communities served by it, and, indeed, shippers in communities on distant lines and persons having no other interest than that of the general public welfare, were entitled to be heard before the Commission and to present whatever proofs might tend to show that the proposed agreement would or would not be for the public welfare. They, however, are not "carriers involved", mentioned in Section 5 (1). Escanaba had the undoubted right accorded it to appear and to be heard on the question of the public interest and welfare and indeed so had every carrier having connections with Milwaukee and Northwestern. The question involved in the

appellant's contention is whether it or any other carrier, not actually a party to the pooling agreement, is a "carrier involved" within the meaning of the Act, so that it may frustrate the agreement by withholding its assent.

Second. Escanaba is not a carrier of the ore which is hauled between Channing and Escanaba under the trackage agreement. It receives no part of the freight paid, it issues no bills of lading, it maintains no tariffs covering that transportation. It neither holds itself out to serve in that respect nor renders any service to shippers of ore; and, as respects the proposed pooling of freights on Milwaukee's traffic, exchanged with it at Channing, and Northwestern's traffic, exchanged with it at Escanaba, is not a carrier involved in the service rendered up to the exchange points, which is to be pooled. But it is said that the word "involved" connotes something more than a party to an agreement; that it embraces any railroad affected by the arrangement. And, it is urged, Escanaba will be seriously injured by the proposed arrangement, in spite of the continuing obligation of Milwaukee to pay it a minimum of $27,000 per annum until 1951.

If a carrier not a party, but adversely affected, is "involved" in the sense of Section 5 (1) Escanaba's assent is a condition precedent to authorization by the Commission. We must then determine the meaning of the phrase as used in the statute. Aid is afforded by the context. The section gives the Commission authority to approve and authorize, "if assented to by all the carriers involved, . . . under such rules and regulations, and for such consideration *as between such carriers* and upon such terms and conditions," as the Commission shall find just and reasonable. This reference to the mutual considerations to be exchanged by "such carriers" shows that Congress meant by the phrase "all the carriers involved," those, and those only, who are parties to the pooling of freights and the division of the proceeds. Escanaba, however, insists that if the section is to be construed to require the assent of none but the parties to the pooling agreement it is mere surplusage. It points out that Milwaukee and Northwestern have assented and are now merely asking the approval and authorization of the Commission. The argument, however, overlooks the fact that the Commission may authorize pooling on the application of a single carrier or upon its own initiative. In the first case the assent of one or more other carriers, and in the second the assent of all

the carriers is a prerequisite to its action. It appears, therefore, that though confined to the parties to the pool, the requirement that all carriers involved shall assent has a proper office in the statutory scheme.

Third. In view of Escanaba's relation to the traffic involved in the proposed pool, the decision that its assent is a prerequisite to the plan's operation would involve the gravest inconvenience and perhaps render the provision of Section 5 (1) nugatory. It is difficult to conceive of any pooling arrangement between two carriers which will not affect, in a greater or less degree, other carriers who interchange traffic with one or the other of the pooling roads, or with their connections. If the private interest of any such outside carrier should move it to refuse its assent to the arrangement it could, in the view urged by the appellant, veto the proposal although, on the whole and in the long view, the consummation of the plan might greatly enhance the economies of operation of large and important carriers and so promote the public interest. We cannot believe that every carrier, in such sense affected by a proposed pool to which it is not a party, was intended to have a status different from, and perhaps at war with, the interest of the general public in the efficient and economical operation of the railroads envisaged by the Transportation Act.

We conclude that not only the words of the statute but the obvious policy and intent underlying its provisions require an affirmance of the judgment of the District Court.

So ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.